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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CITY AND COUNTY OF HONOLULU,
a municipal corporation of the State of Hawaii,
Petitioner,

v.

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusted Trust dated October 15, 1993, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Several lessees of a residential condominium apartment complex ("Lessees") filed a lawsuit against the City and County of Honolulu (the "City") challenging Ordinance 05-001 (2005). Ordinance 05-001 repealed the City's leasehold conversion ordinance, Chapter 38, Revised Ordinances of Honolulu ("ROH"), the statutory process by which leasehold condominium owners, including Lessees, could purchase the leased fee title to their units, through the use of the City's power of eminent domain. Pursuant to Chapter 38, the Lessees executed contracts with the City for the acquisition of the leased fee interests in their condominium units. However, Lessees never received City Council approval prior to the repeal of Chapter 38, and therefore they were unable under Ordinance 05-001 to complete their leasehold conversion.

The Ninth Circuit Court of Appeals departed from the longstanding policy of judicial deference to local legislative determinations of public use in the exercise of the power of eminent domain and held that the City's repeal of Chapter 38 may violate the Contracts Clause and/or the Due Process Clause of the Constitution of the United States.

Therefore, the question presented in this petition is as follows:

Whether the Ninth Circuit erred in concluding that the Honolulu City Council's repeal of the leasehold conversion ordinance may violate the Contracts Clause and/or the Due Process Clause, and whether after the repeal, the City can still be contractually bound to

exercise its power of eminent domain to acquire property for leasehold conversion?

PARTIES TO THE PROCEEDINGS

The Petitioner is the City and County of Honolulu ("Petitioner").

The Respondents are Sally A. Matsuda, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; Ralph James Mitchell; Lucy Mitchell; Noosha Fesharaki; Earl Kidder; Jeenie Marie Kidder; James Rapisarda; Jonathan Von Brana; Thomas Preston; Loren Hohman; Herbert Caplan; Elena Pecile, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; Wilma Parker, Trustee of the Wilma I. Parker Trust dated March 16, 1989 as amended; Troy Williams; Larry Weisner; Delores Weisner; Marianne Marion Jaeger; Richard Johnson; William Garrett Fuson; Kang Yuk Lee; Suk Ja Lee; Claude Rothe, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; Alvin Olson, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; Natalia Indrasari; Warren Sweet, Trustee of the Sweet John Revocable Trust dated June 21, 1991; Rheba Alice Sweet; Robert Mehring; Ayumi Watanabe Mehring; Arnold Flemmings; Mariana Flemmings, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; Melvin Takeo Matsuoka; Delwin Schneider; Katherine Schneider, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; Ronald Silverman; Farhad Simyar; and Frank Winston Kern ("Respondents").

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OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is reported at 512 F.3d 1148, and is reprinted in the Appendix to the Petition ("App.") A. The United States District Court's (D. Hawaii) opinion is reported at 378 F. Supp. 2d 1249 and is reprinted at App. D.

JURISDICTION

The Ninth Circuit Court of Appeals issued its opinion on January 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Contracts Clause of the United States Constitution provides, "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. I, cl. 10.

The Due Process Clause of the United States Constitution provides, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATUTES, ORDINANCES AND CHARTER PROVISIONS INVOLVED

The ordinances at issue in this case are Ordinance 91-95, codified at Chapter 38, Revised Ordinances of Honolulu, which was repealed by Ordinance 05-001. The original version of Ordinance 91-95, the codified version (Chapter 38) and Ordinance 05-001 are set forth in full in the appendix, App. E, F and G.

Section 3-110 of the Revised Charter of the City and County of Honolulu 1973 (2000 Edition) ("RCH") states: "the council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

Hawaii Revised Statutes ("HRS") § 46-1.5(6) provides: "[e]ach county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so."

STATEMENT OF THE CASE

On February 25, 2005, Lessees, owners of residential condominium apartments in the residential complex identified as "Discovery Bay," filed a lawsuit in the district court challenging Ordinance 05-001 (2005). Ordinance 05-001 repealed Chapter 38, Revised Ordinance of Honolulu (Ordinance 91-95), the

statutory process by which leasehold condominium owners, including Lessees, could purchase the leased fee title to their units, through the use of the City's power of eminent domain. Pursuant to Chapter 38, the Lessees executed agreements with the City that provided for the conveyance of leased fee interests in each Lessee's unit. However, these agreements were subject to the Honolulu City Council's approval by resolution, and Lessees never acquired City Council approval prior to the repeal of Chapter 38. Therefore, Lessees were unable under Ordinance 05-001 to complete their leasehold conversion.

In their lawsuit, Lessees asserted that the City's actions in repealing Chapter 38 by the enactment of Ordinance 05-001: (a) violated the Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, by acting to negate Lessees' contract for the sale and purchase of the leased fee title to their units through a condemnation proceeding pursuant to Chapter 38; (b) violated Lessees' right to substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution, and (c) deprived Lessees of rights, privileges, and immunities guaranteed by the U.S. Constitution, subjecting the City to liability pursuant to 42 U.S.C. § 1983.[1] The lawsuit sought to declare Ordinance 05-001 as being void for alleged violations

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[1] Plaintiffs also alleged a violation of the U.S. Constitution's prohibition against Bills of Attainder contained in art. I, § 10, cl. 1, because Ordinance 05-001 acted to single out Lessees. The district court's judgment in favor of the City on this claim was never appealed.

against the U.S. Constitution, and to enjoin its implementation.

By Order filed on July 19, 2005 (App. D), the district court ruled against Lessees in their motion for partial summary judgment, and determined, among other things, that, "the Contract Clause [of the U.S. Constitution] cannot be used under [the] circumstances [of these cases] to invalidate the repeal of Chapter 38 because the reserved powers doctrine reserves essential attributes of sovereignty such as the power of eminent domain to the discretion of the states." *Matsuda et al. v. City and County of Honolulu,* 378 F. Supp. 2d 1249, 1257 (D. Hawaii 2005). Based on these determinations, the district court held that, "[t]he City Council acted within its appropriate constitutional and legal limits in repealing Chapter 38." *Id.* at 1258. By Order dated October 27, 2005 (App. C), the district court reaffirmed its prior ruling by adopting the reasoning set forth in its July 19, 2005 Order, and granting the City's motion for summary judgment as to all counts asserted by Lessees in this lawsuit. Lessees appealed from those Orders.

On January 14, 2008, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") vacated the district court's grant of summary judgment in favor of the City, and remanded this action for further proceedings. App. A. *Matsuda v. City and County of Honolulu,* 512 F.3d 1148 (9th Cir. Hawaii 2008). The Ninth Circuit made an artificial distinction between contracts that require the City to refrain from the exercise of the power of eminent domain, and contracts that require the City to

affirmatively exercise its power of eminent domain. According to the Ninth Circuit, contracts that require the City to refrain from the exercise of the power of eminent domain are not enforceable under the reserved powers doctrine. However, the reserved powers doctrine does not apply to contracts that require the City to affirmatively exercise the power of eminent domain, and such contracts may be binding on the City.

The district court had found that this distinction was illusory. 378 F. Supp. 2d at 1257. The Ninth Circuit disagreed.

The Ninth Circuit's artificial distinction between contracts that require the City **not to** exercise its power of eminent domain, and contracts that require the City **to** exercise its power of eminent domain serves as the basis for this petition. The City asserts that any contractual constraint on the City Council's determination of public purpose in the exercise of its power of eminent domain cannot be binding on the City under the reserved powers doctrine. In the repeal of Chapter 38 by Ordinance 05-001, the City Council specifically determined that leasehold conversion was no longer supported by a valid public purpose. App. G at 131a-32a. The City Council chose to cease the use of its power of eminent domain for leasehold conversion. Therefore, under the reserved powers doctrine, the City Council cannot be constrained in this choice by a contract that binds the City to affirmatively exercise its power of eminent domain.

STATEMENT OF FACTS

A. CHAPTER 38, REVISED ORDINANCES OF HONOLULU ("ROH").

On December 16, 1991, Ordinance 91-95 was enacted, creating a new chapter in the Revised Ordinances of Honolulu ("ROH"), designated as Chapter 38, "Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion." App. F. Chapter 38 set forth the authority, conditions, and process by which lessees under certain long-term leases of condominium units could purchase at a fair and reasonable price the leased fee interests to such condominium units.

The rights of such lessees to acquire the fee simple title to their respective condominium units depended upon the satisfaction of numerous requirements set forth in Chapter 38. Specifically, Chapter 38 required that a minimum of either 25 condominium owners within a condominium project or the owners of at least 50% of the condominium units within the project must apply for leasehold conversion in order to trigger the condemnation mechanism set forth in Chapter 38. ROH § 38-2.2, App. F at 105a. The applicants were also required to be owner-occupants of their units, i.e. the units must have served as their principal place of residence for a period of not less than one year immediately prior to application for conversion and during the period pending legal proceedings to acquire the fee, and the applicants were required to have complete possessory control of the premises during those periods. Applicants were also subject to age and residency requirements, and could not own fee simple

residential lands in the City. ROH § 38-2.4, App. F at 107a. Finally, before condemnation could begin, the City Council was required to adopt a resolution approving the exercise of eminent domain.

Under Hawaii law, the City Council has the ultimate power to condemn and has the discretion whether or not to exercise the power of eminent domain. The City's power of eminent domain flows from HRS § 46-1.5(6). This provision states, "Each county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so." This power of eminent domain is wielded exclusively by the City Council. RCH Section 3-110 states, "the council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

The adoption of a condemnation resolution for leasehold conversion by the City Council would establish that the condemnation of the leased fee interest of the subject property by the City's exercise of its power of eminent domain was necessary for the public purpose and use as declared in Ordinance 91-95 and the purpose stated in Chapter 38. Without an adopted resolution, the City could not initiate a condemnation lawsuit.

B. ORDINANCE 05-001 REPEALS ROH CHAPTER 38.

On January 26, 2005, the City Council of the City and County of Honolulu approved Bill 53 (2004), CD1,

FD1 ("Bill 53") on third reading. On February 9, 2005, Mayor Mufi Hannemann signed Bill 53 into law as Ordinance 05-001, (App. G), which repealed ROH Chapter 38.

In Ordinance 05-001, the City Council issued the following findings:

> The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ('Charter') states: 'The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted.' Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.
>
> The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists 'runaway land prices,' 'shortage of fee simple residential condominiums,' 'artificial

inflation of land values,' 'lessees forced to accept long-term leases . . . which contain terms and conditions which are financially disadvantageous to them,' 'land values, artificially inflated by concentrated or single ownership,' and 'potential for economic instability and disruption on Oahu' as public purposes furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

> In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.
>
> Finally, 'there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it. . . . No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit.' *In re Application of Herrick*, 93 Hawai'i 329, 338 (1996).
>
> Based on the foregoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

App. G at 130a-32a.

These lengthy findings evidence that the City Council appreciated the gravity of the issue, and that Bill 53 was passed as a result of Council's insightful and thoughtful analysis. These findings are of utmost importance in the matter at bar and serve as a complete legal justification for the repeal of Chapter 38. Bill 53 also provided a "savings" clause for those condominium units that were already in the process of

leasehold conversion under Chapter 38 when Ordinance 05-001 became law. The clause provides:

> SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. . . .

App. G at 133a.

The approval of the City Council is the determinative event for the continuation of the leasehold condominium conversion process under ROH Chapter 38 for condominium units that were already in the conversion process when Chapter 38 was repealed. If a condemnation resolution had already been issued for condominium units in the process of condominium conversion, Ordinance 05-001 recognized that those condominium units would be "grandfathered in" and the process of condemnation could continue. The issuance of a condemnation resolution by the City Council was by necessity the determinative factor in the savings clause because the City Council specifically found in Ordinance 05-001 that there no longer was a public purpose in leasehold conversion. Therefore, after the enactment of Ordinance 05-001, the City Council could not issue a new condemnation resolution because such a

resolution could not be supported by a valid public purpose. Only those condominium units covered by a previously issued condemnation resolution could be grandfathered in.

Ordinance 05-001 became law, and Chapter 38 was repealed, effective February 9, 2005. App. G at 135a. Only those lessee applicants who received City Council approval before February 9, 2005 were allowed to complete the process of leasehold condominium conversion under the provisions of Chapter 38.

C. DISCOVERY BAY CONDOMINIUM PROJECT.

The Discovery Bay Condominium project (the "Discovery Bay") consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. The Lessees hold leasehold interests in certain units at Discovery Bay.

Lessees began the processing of their applications for leasehold conversion, wherein they signed agreements with the City to purchase the fee simple interests underlying their leasehold Discovery Bay units. Lessee applicants at Discovery Bay did not receive City Council approval prior to February 9, 2005, and therefore under the "savings clause" of Bill 53, they were unable to complete their leasehold conversion.

D. LESSEES' LAWSUIT.

1. Claims Asserted.

On February 25, 2005, Lessees filed their lawsuit against the City.[2] Lessees claim that their constitutional rights have been violated because Bill 53 does not allow them to complete their leasehold conversions. Specifically, Lessees asserted the following claims against the City:

(1) An alleged violation of the Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, because Bill 53 acted to negate contracts entered into pursuant to Chapter 38 (the "Contract Clause Claim");

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[2] On February 16, 2005, plaintiffs-lessees in *Kathleen Hsiung, et al. v. City and County of Honolulu,* Civil No. CV05-00104 DAE/LEK (the "Kahala Beach Action") filed a lawsuit against the City asserting similar claims, *i.e.*, a Contract Clause Claim, a Bill of Attainder Claim, and a 1983 Claim, against the City, and sought to declare that Ordinance 05-001 was void for alleged violations against the U.S. Constitution, and to enjoin the implementation of said Ordinance. By Stipulation and Order dated June 17, 2005, the parties agreed and the district court ordered that the Kahala Beach Action and the Lessees' lawsuit against the City be consolidated for purposes of discovery and trial because: (a) "[b]oth civil proceedings involved common questions of law as required under Rule 42(a) of the Federal Rules of Civil Procedure, and (b) "[i]t [was] economically and judiciously feasible to consolidate [those] matters for discovery and trial." In *Hsiung et al. v. City and County of Honolulu,* 378 F. Supp. 2d 1258, 1269 (D. Hawaii 2005), the district court entered summary judgment against the plaintiff-lessees Kathleen Hsiung, et al., in favor of the City, as to all claims asserted in the Kahala Beach Action.

(2) An alleged violation of their right to substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution (the "Due Process Claim"); and

(3) An alleged deprivation of rights, privileges, and immunities guaranteed by the U.S. Constitution, art. I, § 10, subjecting the City to liability pursuant to 42 U.S.C. § 1983 (the "§ 1983 Claim").

Lessees' lawsuit sought to declare Bill 53 as being void for alleged violations against the U.S. Constitution, and to enjoin the implementation of Ordinance 05-001.[3]

2. Lessees' Attempt To Enjoin And Restrain The City.

On March 11, 2005, Lessees filed a motion seeking the district court's issuance of a preliminary injunction enjoining and restraining the City from implementing Ordinance 05-001. The district court denied the motion on April 7, 2005, based on the lack of immediate and irreparable harm. Further, because the basic underlying facts are not in dispute and because strong interest exists on the part of the Lessees, the City, and the general public to warrant an

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[3] Plaintiffs also alleged a violation of the U.S. Constitution's prohibition against Bills of Attainder contained in art. I, § 10, cl. 1, because Ordinance 05-001 acted to single out Lessees. The district court's judgment in favor of the City on this claim was never appealed.

expeditious adjudication of these lawsuits, the district court ordered that Lessees, as well as the plaintiffs in the Kahala Beach action, file motions for summary judgment.

3. Lessees' Motion For Summary Judgment.

Lessees filed their motion for summary judgment on April 25, 2005. The City filed its memorandum in opposition to said motion on May 9, 2005, and Lessees filed their reply memorandum on May 16, 2005. The district court held a hearing on the motions for summary judgment on June 22, 2005.

On July 19, 2005, the district court issued its Order denying Lessees' motion for summary judgment. App. D. In the Order, the district court rejected Lessees' arguments in support of their Contract Clause Claim, and recognized that under the "reserved powers" doctrine as articulated by the United States Supreme Court, the Contract Clause cannot be used to bind the City to a contract that purports to restrict its power of eminent domain. The district court stated in part:

> In recent years, the Supreme Court has taken no action that would undermine this longstanding authority. Rather, the Court's latest decisions regarding the power of eminent domain have only bolstered the 'longstanding policy of deference to legislative judgments in this field.' See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005). . . .
>
> . . . .

Plaintiffs simply have not brought forth any argument that would persuade the Court that this clear Supreme Court precedent is somehow inapplicable to the facts of this case. Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternately, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo, 125 S.Ct. at 2668.* ('In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.'). Thus, the Court finds that the Contract Clause cannot be used under these circumstances to invalidate the repeal of Chapter 38, because the reserved powers doctrine reserves essential attributes of

> sovereignty such as the power of eminent domain to the discretion of the states.

App. D at 48a-49a, 378 F. Supp. at 1257.

The Order directed the City to file a motion for summary judgment consistent with that decision.

4. City's Motion For Summary Judgment.

On August 31, 2005, the City filed its motion for summary judgment, seeking an order granting summary judgment in its favor on all claims asserted by Lessees in their Complaint filed on February 25, 2005. On October 7, 2005, Lessees filed their memorandum in opposition, and the City filed its reply memorandum on October 14, 2005.

On October 27, 2005, the district court issued its order granting the City's motion for summary judgment. App. C. In that Order, the district court affirmed and adopted its ruling as set forth in its prior July 19, 2005 Order denying Lessees' motion for summary judgment. The district court ruled, in part:

> In the July 19 order, the Court explained that Plaintiffs' Contracts Clause challenge must fail, because clear, binding precedent indicates that the reserved powers doctrine precludes contractual obligations from limiting a municipality's power of eminent domain. The reserved powers doctrine provides that 'a state government may not contract away "an essential attribute of its sovereignty."' *United States v. Winstar Corp.*, 518 U.S. 839, 888

> (1996). The Court explained to the parties that, under the reserved powers doctrine, 'the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.' *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). Indeed, the United States Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix*, 6 How. 507, 12 L.Ed. 535 (1848); U.S. Trust Co. of New York, 431 U.S. at 24, n. 21. The power of eminent domain, along with the police power, is often cited as the classic example of an 'essential attribute of sovereignty.' *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

App. D at 33a. The district court noted that it did not misinterpret *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977), as alleged by Lessees, and that it found, "[n]o other reason to reconsider its order of July 19." App. D at 34a. The City believes that the district court correctly interpreted the cases and applied the law upon which it based its Orders granting summary judgment in favor of the City and against Lessees.

5. Appeal to the Ninth Circuit.

On January 14, 2008, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") vacated the district court's grant of summary judgment in favor of the City, and remanded this

action for further proceedings. *Matsuda v. City and County of Honolulu*, 512 F.3d 1148 (9th Cir. Hawaii 2008). The Ninth Circuit held as follows:

> The contracts do not purport to require the City to refrain from the exercise of any sovereign power, including the power of eminent domain. Instead, the contracts reflect the City's decision to initiate proceedings to exercise its power of eminent domain over the property at Discovery Bay, and to convey the property to the Lessees if successful. This is not the type of agreement to which the reserved powers doctrine applies and, accordingly, we conclude that *U.S. Trust's* heightened scrutiny test provides the mandatory analysis.

App. A at 13a-14a, 512 F.3d at 1154-55. (Footnotes omitted).

The Ninth Circuit issued its Mandate on February 5, 2008, reinstating the district court's jurisdiction. App. A at 20a.

REASONS FOR GRANTING THE PETITION

A. ORDINANCE 05-001 DOES NOT VIOLATE THE CONTRACT CLAUSE (ART. I, § 10) OF THE UNITED STATES CONSTITUTION.

Lessees first claim was that the City violated the contract clause in art. I, §10 of the United States Constitution which states, "[n]o state shall . . . pass any . . . [l]aw impairing the Obligation of Contracts."

In *University of Hawaii Professional Assembly, et al. v. Cayetano, et al.*, 183 F.3d 1096 (C.A. 9 (Hawaii) 1999), the Ninth Circuit stated: "'[a] federal cause of action is stated under the contract clause when one alleges that he or she has a contract with the state, which the state, through its legislative authority, has attempted to impair.'" *Id.* at 1101. (Citations omitted). To determine whether a law operates as a "substantial impairment of a contractual relationship," the Ninth Circuit identified three components that must be analyzed: "'whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.'" *Id.* at 1101-02. (Citation omitted).

Here, Lessees' claim that Ordinance 05-001 violates the Contract Clause has no merit. First and foremost, the City's power of eminent domain and its regulatory powers cannot be limited by a contract.

Historically, the Supreme Court of the United States has protected governments from contracting away their sovereign powers, including the power of eminent domain. The reserved powers doctrine shields successive legislatures from losing sovereign powers through contracts. *See United States v. Winstar Corporation*, 518 U.S. 839, 874 (1996). Cloaked in this protection, the City cannot be found to have violated the prohibition in the contract clause.

More importantly, the United States Supreme Court decided this matter long ago when it stated:

> As early as Fletcher v. Peck, the Court considered the argument that one legislature

> cannot abridge the powers of a succeeding legislature. It is often stated that the legislature cannot bargain away the police power of a State. . . *In short, the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty. . . [T]he police power and the power of eminent domain were among those that could not be contracted away.*

United States Trust Company of New York v. New Jersey, 431 U.S. 1, 23 (1977); (Internal citations and quotations omitted) (Emphasis added).

These United States Supreme Court decisions create an impenetrable barrier to the relief the Lessees seek in this case.

B. THE CITY COUNCIL'S RIGHT TO EXERCISE ITS POWER OF EMINENT DOMAIN AS IT SEES FIT CANNOT BE ABRIDGED BY CONTRACT.

Ordinance 05-001 contained the following finding: "[u]nder Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn." App. G at 131a.

The City's power of eminent domain flows from HRS § 46-1.5(6). This provision states, "Each county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so." As reiterated in the Council's

findings above, this power is wielded by the City Council[4] and it cannot be surrendered.

The United States Supreme Court has long held that power of eminent domain is preserved despite any contract provisions to the contrary. The Court stated:

> The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.

State of Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1923).

More succinctly stated, all contracts are subject to the right of eminent domain. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) citing *West River Bridge v. Dix*, 47 U.S. 507, 6 How. 507, 12 L. Ed. 535 (1848).

State courts have followed in the footsteps of the high court. The Supreme Court of Wisconsin stated,

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[4] Section 3-110 of the Revised Charter of the City and County of Honolulu states, "[t]he council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted."

"[t]he power of eminent domain is inalienable, and no Legislature can bind itself of its successors not to exercise this power when public necessity and convenience require it." *City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 152 (1952).

Similarly, the Court of Appeals of Texas stated:

> A city may not enter into a contractual provision that limits its free exercise of governmental and police powers. The power of eminent domain or condemnation is a governmental function that cannot be delegated. A contract restricting a city's freedom to choose when to initiate condemnation proceedings is a contract in derogation of such power. Therefore, such a contractual restriction is contrary to public policy and, thus, illegal and void.

City of Corpus Christi v. Taylor, 126 S.W.3d 712, 719 (2004).

The above cases fortify the principle that a government cannot enter into an agreement to limit its eminent domain power. A government may elect to use its condemnation power if it so chooses. The reflection of this principle is equally clear. A legislative body cannot be bound by an agreement to affirmatively use its eminent domain power. A government may elect **not** to use its eminent domain power if it so chooses. The district court correctly echoed the City's position when it stated, "[a] contract requiring the sovereign to exercise the [eminent domain] power is just as limiting as a contract

prohibiting it from doing so." App. D at 49a, 378 F. Supp. at 1257.

This principle is evident in *Western Union Telegraph Co. v. Louisville & N.R. Co.*, 258 U.S. 13 (1922). There, the State of Kentucky enacted a statute whereby the telegraph company was authorized to condemn an easement for its use. Western Union initiated a condemnation proceeding against the railroad company pursuant to this statute. The condemnation proceeding traveled through the trial and appellate process and back to the trial court. However, the government then repealed the subject statute. The railroad company sought to dismiss the proceedings.

The United States Supreme Court held:

> Our conclusion, therefore, is that as the state could have withheld the power from telegraph companies to condemn the right of way of railroad companies, the state could withdraw the power before its exercise, and it could not be exercised before the conditions of condemnation were established and adjudicated, and this not preliminarily or dependently, but in final and unreviewable determination.

Id. at 22.

Accordingly, an agreement to exercise the power of eminent domain may be retracted if the government elects to do so. Therefore, even if contracts between the Lessees and the City are construed as requiring the City to affirmatively exercise its condemnation

powers in favor of the Lessees, the City is not restricted by such a provision. The City Council has the legislative authority to repeal Chapter 38 despite any contractual provision otherwise.

As recognized by the City Council, "it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely." App. G at 132a.

C. THE NINTH CIRCUIT'S DISTINCTION BETWEEN CONTRACTS RESTRAINING THE EXERCISE OF THE POWER OF EMINENT DOMAIN, AND CONTRACTS AFFIRMATIVELY REQUIRING THE EXERCISE OF THE POWER OF EMINENT DOMAIN IS ILLUSORY.

The Ninth Circuit's opinion made an artificial distinction between contracts that require the City to refrain from the exercise of the power of eminent domain, and contracts that require the City to affirmatively exercise its power of eminent domain. According to the Ninth Circuit, contracts that require the City to refrain from the exercise of the power of eminent domain are not enforceable under the reserved powers doctrine. However, the reserved powers doctrine does not apply to contracts that require the City to affirmatively exercise the power of eminent domain, and such contracts may be binding on the City.

The district court had found that this distinction was illusory. The district court stated:

> Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternatively, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo*, 125 S.Ct. at 2668 ('In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.').

App. D at 49a, 378 F. Supp. 2d at 1257.

The Ninth Circuit disagreed with the district court and held:

> *West River Bridge* and *Contributors to Pennsylvania Hospital* stand for the proposition that the Contracts Clause cannot be used to bind a state to a contract that prevents it from exercising its power of eminent domain. Yet such facts have not been alleged here. In this case, the Lessees have not accused the City of impairing its contracts with them by exercising its power of eminent domain to take for public use property which it previously conveyed to the Lessees. Instead, the Lessees accuse the City of reneging on its contractual promise to use its best efforts to effectuate a condemnation proceeding against the property at Discovery Bay and, if successful, to convey the property to the Lessees. Accordingly, we find the Lessees' claim to be distinct from those Contracts Clause claims to which the Supreme Court has applied the reserved powers doctrine in the past.

App. A at 12a, 512 F.3d at 1154.

The Ninth Circuit's artificial distinction between contracts that require the City **not to** exercise its power of eminent domain, and contracts that require the City **to** exercise its power of eminent domain serves as the basis for this petition. The City asserts that any contractual constraint on the City Council's determination of public purpose in the exercise of its power of eminent domain cannot be binding on the City under the reserved powers doctrine. In the repeal of Chapter 38 by Ordinance 05-001, the City Council

specifically determined that leasehold conversion was no longer supported by a valid public purpose. The City Council chose to cease the use of its power of eminent domain for leasehold conversion. Therefore, under the reserved powers doctrine, the City Council cannot be constrained in this choice by a contract that binds the City to affirmatively exercise its power of eminent domain.

D. COURTS MUST DEFER TO THE LEGISLATIVE BRANCH'S DETERMINATION OF PUBLIC USE

The courts must defer to the legislative branch when faced with issues of public purpose and eminent domain. This Court has long held that the necessity and proper extent of a taking is a legislative question. *Sears v. City of Akron*, 246 U.S. 242, 251 (1918). This Court recognized that the "legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." *Berman v. Parker*, 348 U.S. 26, 32 (1954), and the public interest requirement is "coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In *Berman,* this Court clearly stated that "when the legislature has spoken, the public interest has been declared in term well-nigh conclusive." 348 U.S. at 32. In *Midkiff,* this Court reiterated the holding of *Berman*, in holding that the court's role in reviewing a determination of a public use "is an extremely narrow one." 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Most recently, this Court stated that "for more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures

broad latitude in determining what public needs justify the use of the taking power." *Kelo v. City of New London*, 545 U.S. 469, 482, 125 S. Ct. 2655, 2664 (2005). In all of these cases, this Court emphasized the importance of deferring to legislative determinations of public purpose.

Midkiff stood for the proposition that the State of Hawaii's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use, justifying the enactment of a leasehold conversion statute for single-family dwellings in Hawaii. 467 U.S., at 241-242, 104 S.Ct. 2321. Likewise, the Ninth Circuit upheld the constitutionality of Chapter 38, the leasehold conversion ordinance for condominium units, in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995). Both this Court in *Midkiff* and the Ninth Circuit in *Richardson*, afforded the state and local legislatures great deference in their determination of the public purpose supporting mandatory leasehold conversions. That same deference should be afforded to the Honolulu City Council in its repeal of the leasehold conversion ordinance (Chapter 38), and in its legislative determination that condominium leasehold conversions no longer serve a public purpose.

When the City Council enacted Chapter 38, a public purpose supported the use of its eminent domain power. The City Council found that runaway land prices, forced long-term leases, and land values artificially inflated by concentrated ownership shouldered the public purpose requirement. App. E at 53a-58a. However, some fourteen years later, the

Council found that the same socio-economic conditions no longer existed to justify the use of the City's eminent domain power to reallocate land ownership on Oahu. App. G at 131a-132a. Without this public purpose, the City Council was left with no choice but to repeal Chapter 38 through the enactment of Ordinance 05-001.

This Court must not question the City Council's finding of an absence of public purpose. As the district court stated, "The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest." App. D at 49a, 378 F. Supp. 2d at 1257. Here, the City Council chose not to exercise that power when the reallocation of land ownership through prior condemnations under Chapter 38 balanced the land oligopoly. This Court must not interfere with the City Council's determinations regarding the absence of a public purpose.

E. THE CITY'S EMINENT DOMAIN POWER IS NOT BOUND BY THE PROHIBITION IN THE CONTRACT CLAUSE.

This Court has ruled that the prohibition in the contract clause is eclipsed by the government's eminent domain power. As early as 1917, this Court has held:

> There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of

> the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties....[I]t is equally true that *the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine.*

Contributors to Pennsylvania Hosp. v. City of Philadelphia, 245 U.S. 20, 23-24 (1917). (Emphasis added).

In a later decision, this Court carved out the path for lower courts to follow. This Court stated:

> When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that one legislature cannot abridge the powers of a succeeding legislature. It is often stated that the legislature cannot bargain away the police power of a State. This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.

> *In short, the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty. . . [T]he police power and the power of eminent domain were among those that could not be contracted away.*

United States Trust Company of New York v. New Jersey, 431 U.S. 1, 23 (1977). (Internal citations and quotations omitted) (Emphasis added).

The Ninth Circuit held that the district court erred in failing to apply a "heightened scrutiny test" in reviewing the Contract Clause claim. However, under the reserved powers doctrine, the court's initial inquiry is whether the government has the ability to enter into an agreement that limits its power to act in the future. As the district court herein explained, "[t]his inquiry requires a determination as to the state's power to create irrevocable contract rights, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. 'In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.'" App. D at 46a, 378 F. Supp. 2d at 1255. (Citations omitted). A Contract Clause analysis which assesses the purpose or reasonableness of any impairment of Lessees' contracts is simply inapplicable.

Here, Lessees should not prevail on their claim under the Contract Clause. The Lessees' contracts with the City limit the City's power by forcing it to exercise its condemnation powers when the public

purpose that once supported the contracts no longer exists.

This Court has considered this issue and ruled. As the district court explained, "the United States Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. App. D at 46a, 378 F. Supp. 2d at 1255. The prohibition in the Contracts Clause bows to the power of eminent domain, which is an "essential attribute of sovereignty." *Id.*

F. LESSEES' SUBSTANTIVE DUE PROCESS CLAIM FAILS BECAUSE IT IS PREEMPTED BY OTHER CONSTITUTIONAL CLAIMS.

The Lessees claim that the City violated their substantive due process rights as contained in the Fourteenth Amendment that states, "[n]o State shall . . . deprive any person of . . . property, without due process of law." However, Lessees are precluded from asserting a contract clause claim and a substantive due process claim in the same breath.

The Ninth Circuit in its opinion below stated:

> We express no opinion as to whether any property interests potentially arising from the Lessees' contracts could meet the 'exceedingly high' burden our Due Process jurisprudence imposes. Furthermore, we express no opinion as to whether our decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc),

> precludes the Lessees from asserting a substantive due process claim in this case, where the Contracts Clause provides a specific source of constitutional protection against the government conduct of which they complain.

App. A at 17a-18a, 512 F.3d at 1156.

Even if the Ninth Circuit now expresses no opinion on the effect of the *Armendariz* case, the Ninth Circuit previously ruled in no uncertain terms, "when an explicit textual provision of the Constitution protects against the challenged government action, the claim must be analyzed under that specific provision alone and not under the more general guarantee of substantive due process." *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (citing *Armendariz*, 75 F.3d 1311, 1325-1326 (1996)). This is true regardless of whether the plaintiff's potential claim under the more specific textual provision has merit. *Armendariz* at 1325-1326.

Consequently, Lessees' substantive due process claim fails because it is preempted by the more specific constitutional provision, the contract clause, regardless of its merits.

Furthermore, as discussed above, Lessees cannot establish a property right under the subject contract because the City's eminent domain power cannot be surrendered under any terms.

G. LESSEES ARE NOT ENTITLED TO RELIEF UNDER 42 U.S.C. § 1983.

As demonstrated above, the City did not violate Lessees' constitutional rights. The protection afforded by the reserved powers doctrine shields the City from culpability.

Furthermore, as previously stated, the City Council found that the social and economic ills do not exist today in the same manner that they did in 1991. Based upon this finding, the City Council repealed Chapter 38. The Council did not have a culpable intent to deprive Lessees of their constitutional rights. *See Board of the County Commissioners of Bryan County*, 520 U.S. 378, 404 (1989) (A 1983 plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights).

Therefore, Lessees' claims under 42 U.S.C. § 1983 also fail.

CONCLUSION

In light of the above facts and authorities, the City respectfully requests that the City's Petition for Writ of Certiorari be granted.

DATED: Honolulu, Hawaii, April 14, 2008.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15337
D.C. No. CV-05-000125-DAE

[Filed January 14, 2008]

Sally A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; Ralph James Mitchell; Lucy Mitchell; Noosha Fesharaki; Earl Kidder; Jeenie Marie Kidder; James Rapisarda; Jonathan Von Brana; Thomas Preston; Loren Hohman; Herbert Caplan; Elena Pecile, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; Wilma Parker, Trustee of the Wilma I. Parker Trust dated March 16, 1989 as amended; Troy Williams; Larry Weisner; Delores Weisner; Marianne Marion Jaeger; Richard Johnson; William Garrett Fuson; Kang Yuk Lee; Suk Ja Lee; Claude Rothe, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; Alvin Olson, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; Natalia Indrasari; Warren Sweet, Trustee of the Sweet John Revocable Trust dated June 21, 1991; Rheba Alice Sweet; Robert Mehring; Ayumi Watanabe Mehring; Arnold Flemmings;

Mariana Flemmings, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; Melvin Takeo Matsuoka; Delwin Schneider; Katherine Schneider, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; Ronald Silverman; Farhad Simyar; Frank Winston Kern,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
November 2, 2007 – Honolulu, Hawaii

Filed January 14, 2008

Before: DIARMUID F. O'SCANNLAIN, A. WALLACE TASHIMA, and MILAN D. SMITH, JR., Circuit Judges.

COUNSEL

David A. Nakashima, Alston Hunt Floyd & Ing, Honolulu, Hawaii, argued the cause for the plaintiffs-appellants, and filed briefs; Lerisa L. Heroldt

and Clyde J. Wadsworth, Alston Hunt Floyd & Ing, Honolulu, Hawaii, were on the briefs.

Don S. Kitaoka, Deputy Corporation Counsel, City and County of Honolulu, Hawaii, argued the cause for the defendant-appellee and filed a brief; Carrie K.S. Okinaga, Corporation Counsel, Paul M. Iguchi and Derek T. Mayeshiro, Deputy Corporation Counsels, City and County of Honolulu, Hawaii, were on the briefs.

OPINION

O'SCANNLAIN, Circuit Judge.

We are called upon to determine whether the United States Constitution imposes any limit on the City of Honolulu's power to repudiate a contract to convey property to a private citizen in connection with its leasehold conversion program.

I

A

In 1991, the City and County of Honolulu (the "City") enacted an ordinance, later codified at Chapter 38 of the Revised Ordinances of Honolulu ("Chapter 38"), which created a mechanism allowing owners of leasehold interests in condominium units to convert their leasehold interests into fee interests by using the

City's power of eminent domain.[1] We upheld the constitutionality of Chapter 38 in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995). As we explained in that case, Chapter 38 was a response to Hawaii's long history of feudal land ownership, which survived well after American acquisition. *Id.* at 1153. At the time of Chapter 38's enactment, a small handful of landowners owned the vast majority of land in the State. Despite the efforts of Hawaii's leaders to divide these large Hawaiian land estates, the system persisted, driving the price of land in Hawaii to exorbitant heights. Taking advantage of this status quo, Hawaiian landowners rarely sold their estates. Instead, they frequently leased their land for long terms, often to developers who would construct condominiums on the property and then sell the units subject to the ground lease. *Id.* at 1153-54.

To break up this pattern and to increase the opportunity for land ownership, the City enacted Chapter 38. Chapter 38 provided that when a sufficient number of condominium unit owners within a condominium complex applied, the City would take steps to acquire the property on which their condominium complex was built from the landowner by power of eminent domain. The City would then convey each condominium unit and the appurtenant land to the lessee-applicants in fee simple.

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[1] The Hawaii Legislature has delegated the power of eminent domain to local bodies such as the City. Haw. Rev. Stat. § 46-1.5(6) (2006).

Specifically, Chapter 38 required an application from a minimum of either 25 condominium owners within a development or the owners of at least 50% of the condominium units within the development to trigger its condemnation mechanism. Revised Ordinances of Honolulu § 38-2.2(a)(1). Upon such application, the City's Department of Housing and Community Development (the "Department") would hold a duly-noticed public hearing to determine whether the acquisition of the property though eminent domain would "effectuate public purposes" as defined in Chapter 38. *Id.* § 38-2.2(a)(2). If the Department issued a finding answering that question in the affirmative, the Department would initiate condemnation proceedings unless the landowner agreed to convey the fee interests to the lessee-applicants directly. *Id.* Finally, before condemnation could begin, the City Council was required to adopt a resolution approving the exercise of eminent domain and appropriating the necessary funds to pay just compensation. *Id.*; City & County of Honolulu Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion § 2-12.

B

Sally Matsuda and the other appellants in this suit (the "Lessees") hold leasehold interests in condominium units at the Discovery Bay condominium complex in Honolulu, Hawaii. The Lessees applied to the City under Chapter 38 to convert their leasehold interests into fee simple interests in their units and the appurtenant land. Upon receipt of the Lessees' applications, the City entered into individual written

contracts with each Lessee in which the Lessee promised to pay the City $1,000 in exchange for the City's promise that, upon its successful acquisition of the property at Discovery Bay, the City would convey a fee interest to each Lessee in her unit and the appurtenant land. Each contract was expressly conditioned on the City's successful acquisition of the property pursuant to Chapter 38, and each party agreed to use its best efforts to effectuate the acquisition.

On July 3, 2004, after a duly-noticed public hearing, the Department announced its finding that condemnation of the property at Discovery Bay would serve the public purpose required by Chapter 38. A few months later, in late October or early November, the Lessees received written notice of their final approval to proceed with Chapter 38's leasehold conversion procedure. Finally, on November 24, the Department designated the Lessees' leasehold interests in the real property and other common elements at Discovery Bay for acquisition through the City's exercise of eminent domain, finding that the Lessees had satisfied Chapter 38's numerosity requirement, that the condemnation would effectuate the public purpose of Chapter 38, and that no agreement for a voluntary sale by the landowner had been made.

As the Lessees' application was progressing, however, the Honolulu City Council began considering a proposed bill that would repeal Chapter 38. As the proposed bill's statement of purpose explained, some members of the Council had determined that Chapter 38's goal of "provid[ing] affordable housing" and "strengthen[ing] the economy through fee ownership"

had largely been satisfied, rendering the provision unnecessary.

On November 10, 2004, a councilmember introduced a measure seeking a City Council resolution to approve the initiation of condemnation proceedings at Discovery Bay. Even though the Lessees' applications had met all the requirements of Chapter 38, the Council deferred consideration of the resolution pending the possible repeal of Chapter 38.

On January 26, 2005, the Council enacted Ordinance 05-001, repealing Chapter 38. The ordinance permitted any condemnation proceeding approved by City Council resolution before the effective date of the repeal to continue, but because the City Council never took such a step to approve the condemnation of the property at Discovery Bay, the project failed.

The Lessees filed suit against the City in the district court, arguing that Ordinance 05-001 violated the Contracts Clause, the Fourteenth Amendment's Due Process Clause, and 42 U.S.C. § 1983, and seeking declaratory and injunctive relief.[2] Shortly thereafter, the Lessees moved for a preliminary injunction to enjoin the implementation of the ordinance, which the district court denied. The Lessees then filed a motion for summary judgment, which the district court denied as well, granting summary judgment in favor of the

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[2] The Lessees also argued that the ordinance was an unconstitutional bill of attainder, U.S. Const. art. I, § 10, a claim they do not raise on this appeal.

City instead. *Matsuda v. City and County of Honolulu*, 378 F. Supp. 2d 1249 (D. Haw. 2005). The district court concluded that the Lessees could not challenge Ordinance 05-001 under the Contracts Clause because the Lessees' contracts with the City were unenforceable. It reasoned that the "reserved powers" doctrine precluded the City from entering into the contracts because they purported to limit the City's discretion over the use of its eminent domain power, a power which has been labeled an "essential attribute of sovereignty." *Id.* at 1255 (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996)).

The Lessees timely appeal.

II

We begin with the Lessees' claim that Ordinance 05-001 impaired their contracts with the City in violation of the Contracts Clause of the United States Constitution. The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Despite the sweeping terms of its literal text, the Supreme Court has construed this prohibition narrowly in order to ensure that local governments retain the flexibility to exercise their police powers effectively. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978); *El Paso v. Simmons*, 379 U.S. 497 (1965); *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934). Nevertheless, when a state's action interferes with its own contractual obligations, as opposed to mere private contracts, the Court has made clear that we are to examine the state's conduct with a higher level of

scrutiny.[3] *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 20-21 (1977).

Under this heightened scrutiny test, first announced in *U.S. Trust,* we consider (1) "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," *Energy Reserves Group, Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411 (1983) (citations and internal quotation marks omitted); (2) whether the state law is justified by a "significant and legitimate public purpose," *id.*; and (3) whether the impairment resulting from the law is both "reasonable and necessary to fulfill [such] public purpose," *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889-90 (9th Cir. 2003) (per curiam) (citations and internal quotation marks omitted).

In the case before us, however, the district court did not apply the *U.S. Trust* test to the Lessees' Contracts Clause claim, concluding instead that heightened scrutiny was not appropriate because the reserved powers doctrine rendered the Lessees' contracts with the City void *ab initio. Matsuda,* 378 F. Supp. 2d at 1255.

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[3] The Contracts Clause applies to a municipality such as the City. *See Rui One Corp. v. City of Berkeley,* 371 F.3d 1137, 1141, 1147 (9th Cir. 2004).

A

[1] The reserved powers doctrine is a label the Supreme Court has applied to describe the uncontroversial proposition that a state may not enter a contract that "surrenders an essential attribute of its sovereignty" and that, as a consequence, the Contracts Clause may not be used to compel a state to adhere to a contract that purports to achieve such a result. *U.S. Trust,* 431 U.S. at 23. Although a complete list of the essential attributes of sovereignty which may not be contracted away has never been established, it is well-settled that "a State cannot be bound by a contract forbidding the exercise of its police power," *U.S. Trust,* 431 U.S. at 24 n. 21, 97 S.Ct. 1505 (citing *Stone v. Mississippi,* 101 U.S. 814, 817 (1880)), and that "a State cannot contract away [its] power of eminent domain," *id.*(citing *West River Bridge Co. v. Dix,* 47 U.S. 507 (1848)).

[2] Despite this, most contracts in which a state agrees to limit its power to act in the future will not be subject to prohibition. *Id.* at 24-25. Indeed, as "the Court has regularly held," a state will be bound by contracts that limit the use of its taxing and spending powers, even though such contracts limit the state's future exercise of discretion in material ways. *Id.*

In turning to the question of whether the City's contracts with the Lessees in this particular case are subject to the reserved powers doctrine, we note that the Supreme Court has explained that our initial task is to determine whether the state had the "power to create irrevocable contract rights in the first place." *Id.* at 23. The City argues that it did not, because these

contracts purport to limit its discretion over its essential power of domain. The Supreme Court has twice decided cases in which a Contracts Clause claim implicated a state's power of eminent domain, as the City argues has occurred here, and so, we examine those precedents.

In *West River Bridge,* a corporation received a charter from the State of Vermont which entitled it to operate a toll bridge across a river and to collect tolls from passengers. 47 U.S. at 530. Several years later, the State initiated condemnation proceedings which extinguished the corporation's franchise and converted the bridge into a free public highway. *Id.* at 531. Just compensation was assessed. *Id.* The corporation asserted a Contracts Clause claim, which the Court rejected, concluding that the Constitution did not prohibit the State from using its eminent domain power, even where the property taken was previously conveyed by the State. *Id.* at 532-33. As the Court explained, all contracts, whether they are between a state and a private actor or private actors alone, are made subject to the understanding that the state may one day take the subject property for public use, provided that just compensation is paid. *Id.*

A similar situation arose in *Contributors to Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20 (1917). In that case, a hospital entered a contract with the State of Pennsylvania which resulted in a state statute specifically forbidding the State from opening any street or alley on hospital grounds without the hospital's consent. *Id.* at 21. Several years later, however, the City of Philadelphia, through the power conferred upon it by the State, initiated

condemnation proceedings against the hospital's land for the purpose of opening a public street. *Id.* at 21-22. The hospital asserted a Contracts Clause claim, which the Court again rejected, concluding that, regardless of Pennsylvania's promise to the hospital, states lack the power to divest themselves of their right to perform "essential governmental duties" such as exercising the power of eminent domain when a public need so requires. *Id.* at 23-24.

[3] *West River Bridge* and *Contributors to Pennsylvania Hospital* stand for the proposition that the Contracts Clause cannot be used to bind a state to a contract that prevents it from exercising its power of eminent domain. Yet such facts have not been alleged here. In this case, the Lessees have not accused the City of impairing its contracts with them by exercising its power of eminent domain to take for public use property which it previously conveyed to the Lessees. Instead, the Lessees accuse the City of reneging on its contractual promise to use its best efforts to effectuate a condemnation proceeding against the property at Discovery Bay and, if successful, to convey the property to the Lessees. Accordingly, we find the Lessees' claim to be distinct from those Contracts Clause claims to which the Supreme Court has applied the reserved powers doctrine in the past.

The district court held otherwise, concluding that the contracts at issue required the City to exercise its eminent domain power and that "[a] contract *requiring* a sovereign to exercise the power [of eminent domain] is just as limiting as a contract prohibiting it from

doing so." *Matsuda*, 378 F. Supp. 2d at 1257 (emphasis added).[4] We disagree.

As an initial matter, the City's contracts with the Lessees did not expressly require the City to condemn the property at Discovery Bay. As discussed above, Chapter 38 imposed several requirements for a successful condemnation which were beyond the City's power to control, and the City only agreed to use its best efforts to achieve those results. Thus, if an insufficient number of condominium owners applied to the City or if the public hearing held by the Department failed to produce a finding that condemnation would serve a valid public purpose, the City would not have been obligated under the contracts to proceed with the condemnation.

[4] More importantly, however, the City's contracts with the Lessees do not restrict its ability to exercise its eminent domain power in any way. The contracts reflect the City's voluntary undertaking to use its best efforts to effect a condemnation of the property at Discovery Bay and to convey that property to the Lessees if successful. The contracts do not purport to

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[4] The district court drew support for this conclusion from *Kelo v. City of New London*, 545 U.S. 469 (2005). As the district court noted, *Kelo* emphasized that states remain free to impose limitations on their own exercise of any power, including the takings power, stricter than the limitations required by the United States Constitution. *Id.* at 489, 125 S.Ct. 2655. Yet *Kelo* provides no guidance regarding the question presented here: whether a state actor's contract to convey property if successfully acquired through eminent domain is subject to *U.S. Trust*'s heightened scrutiny analysis or is void on its face.

require the City to refrain from the exercise of any sovereign power, including the power of eminent domain.[5] Instead, the contracts reflect the City's decision to initiate proceedings to exercise its power of eminent domain over the property at Discovery Bay, and to convey the property to the Lessees if successful. This is not the type of agreement to which the reserved powers doctrine applies and, accordingly, we conclude that *U.S. Trust*'s heightened scrutiny test provides the mandatory analysis.[6]

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[5] Indeed, there is no provision in the contracts that purports to prevent the City from conveying the property to the Lessees and later taking the property for public use. Thus, these contracts contain none of the same elements the Court found unenforceable in *West River Bridge* and *Contributors to Pennsylvania Hospital.*

[6] Indeed, as a survey of our Contracts Clause jurisprudence indicates, Ordinance 05-001 is quite analogous to the state actions this court and the Supreme Court have assessed under *U.S. Trust. See U.S. Trust,* 431 U.S. at 1518 (holding that concurrent and parallel New York and New Jersey statutes that retroactively repealed a covenant between the States and bondholders in the state-owned Port Authority was subject to Contracts Clause analysis); *Winstar,* 518 U.S. at 888-89 (concluding that a congressional statute that prohibited federal entities from complying with their contracts to provide various financial institutions with certain accounting treatment was subject to the Contracts Clause and that the reserved powers doctrine did not relieve the federal government from liability); *Cayetano,* 336 F.3d at 1099 (determining that a Hawaii statute that repealed the payroll system for state employees agreed to under a collective bargaining agreement and implemented a new system in its place was subject to a Contracts Clause claim).

B

[5] Turning to the *U.S. Trust* test, our first inquiry is whether Ordinance 05-001 "operated as a substantial impairment of a contractual relationship." *Cayetano,* 183 F.3d at 1101 (quoting *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (internal quotation marks omitted)). The Supreme Court has subdivided this inquiry into three separate questions: (1) "whether there is a contractual relationship"; (2) "whether a change in law impairs that contractual relationship"; and (3) "whether the impairment is substantial." *Seltzer v. Cochrane,* 104 F.3d 234, 236 (9th Cir. 1996) (quoting *Gen. Motors Corp.,* 503 U.S. at 181).

[6] The parties do not dispute that a contractual relationship existed prior to the enactment of Ordinance 05-001. Turning to the questions of whether the ordinance impaired that contractual relationship and whether such impairment was substantial, the parties are in disagreement and the record is not fully developed.[7] Whether there was a substantial impairment is precisely the question *U.S. Trust* instructed the district court to answer in the first step of its analysis. Because the district court determined that the reserved powers doctrine rendered the City's contracts unenforceable, it never reached this

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[7] The contracts were "expressly conditioned" upon the City's successful acquisition of the property, but it is unclear whether the repeal of Chapter 38 under a mechanism such as Ordinance 05-001 was contemplated under the agreement, although as the City conceded at oral argument, the City was, at minimum, under an implied duty of good faith and fair dealing.

threshold question. We believe this analysis is most appropriate for the district court to engage in on remand as a matter of first impression.

[7] Accordingly, we vacate the district court's grant of summary judgment to City on the Lessees' Contracts Clause claim and remand to allow the district court to consider the Lessees' claim under the framework set forth in *U.S. Trust.*

III

[8] Having addressed the Lessees' Contracts Clause claim, we next turn to their contention that Ordinance 05-001 violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. We have held that contracts such as the Lessees' may give rise to property interests protected by this provision. *See Brewster v. Bd. of Educ.*, 149 F.3d 971, 982-83 (9th Cir. 1998). Further, the Due Process Clause confers both procedural and substantive rights. *Richardson,* 124 F.3d at 1162 (citing *United States v. Salerno,* 481 U.S. 739, 746 (1987)). In evaluating a substantive due process claim such as the Lessees', we have determined that state action which "neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights" will violate substantive due process only if the action is "not rationally related to a legitimate governmental purpose." *Id.* (quoting *Munoz v. Sullivan,* 930 F.2d 1400, 1404 (9th Cir. 1991)).

[9] The burden this places on the plaintiff is "extremely high." *Id.* (citing *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1508 (9th Cir. 1990)). To prove that the City's enactment of Ordinance 05-001 violated their substantive due process rights, the Lessees must demonstrate first that their contracts were the type of property the Due Process Clause protects and, second, that the City deprived them of their rights under the contracts in a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998) (quoting *Salerno,* 481 U.S. at 746) (internal quotation marks omitted).

[10] The district court did not evaluate the Lessees' claim under this framework because it determined that the reserved powers doctrine relieved the City of its obligations and left the Lessees without any enforceable contractual rights that could be protected by the Due Process Clause. *Matsuda,* 378 F. Supp. 2d at 1258. Because we have already concluded that the district court's application of the reserved powers doctrine was in error, we remand to the district court to reconsider the Lessees' due process claim once it has determined whether the Lessees had any contractual rights that could give rise to a protected property interest.

We express no opinion as to whether any property interests potentially arising from the Lessees' contracts could meet the "exceedingly high" burden our Due Process jurisprudence imposes. Furthermore, we express no opinion as to whether our decision in *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996)

(en banc), precludes the Lessees from asserting a substantive due process claim in this case, where the Contracts Clause provides a specific source of constitutional protection against the government conduct of which they complain. *Id.* at 1318.

IV

[11] Finally, we turn to the Lessees' contention that the City's alleged violations of the Contracts Clause and Due Process Clause violate § 1983. As an initial matter, we note that from the face of the Lessees' complaint and their subsequent filings in the district court, it is unclear whether they have preserved a claim for damages under § 1983 in the event the district court determines on remand that a constitutional violation has occurred. Nevertheless, both the Contracts Clause and the Due Process Clause may give rise to a claim under § 1983. *See S. Cal. Gas Co.*, 336 F.3d at 886-87 (holding that a Contracts Clause violation may support a § 1983 claim); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing a plaintiff's § 1983 claim predicated on an alleged violation of his substantive due process rights). Accordingly, because we conclude that the district court erred in applying the reserved powers doctrine to find that no constitutional violations occurred, we vacate the district court's grant of summary judgment to the City on the Lessees' § 1983 claims and remand. If the district court on remand determines that the Lessees' contractual rights survived Chapter 38's repeal, the Lessees may be able to assert a claim under § 1983 under either constitutional provision.

V

Based on the foregoing, we VACATE the district court's grant of summary judgment in favor of the City and REMAND for further proceedings. Each party shall bear its own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15337
D.C. No. CV-05-000125-DAE

[Filed January 14, 2008]

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; et al.,	)
Plaintiffs-Appellants,	)
V.	)
CITY AND COUNTY OF HONOLULU,	)
Defendant-Appellee.	)

JUDGMENT

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Trascript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **VACATED and case is REMANDED for further**

proceedings. Each party shall bear its own costs on appeal.

Filed and entered 01/14/08.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case: CV 05-000125DAE-LEK

[Filed January 30, 2006]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiff(s),	)
	)
V.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant(s).	)
	)

JUDGMENT IN A CIVIL CASE

* * *

[✓] **Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendant City and County of Honolulu and against Plaintiffs pursuant to the

"Order Granting Defendant's Motion for Summary Judgment" filed on October 27, 2005.

cc: all counsel of record

January 30, 2006
Date

SUE BEITIA
Clerk

/s/
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CV. NO. 05-000125 DAE-LEK

[Filed October 27, 2005]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendant's motion and the supporting and opposing memoranda, the Court GRANTS Defendant's Motion for Summary Judgment.

FACTUAL BACKGROUND

Plaintiffs, who hold leasehold interests in residential condominiums at the Discovery Bay condominium complex, have sued Defendant, the City and County of Honolulu ("City"), seeking to invalidate a city ordinance that Plaintiffs claim violates the Due Process Clause and the Contracts Clause of the United States Constitution.

Plaintiffs each hold legal title to their respective residential condominium units in the Discovery Bay condominium complex, which consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. Plaintiffs individually entered into written Leased Fee Interest Purchase Contracts with the City. Plaintiffs each paid the City $1,000 in consideration, and in return, the City agreed as follows:

> The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (I) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and (b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Real Property").

(*See, e.g.*, Pl. Memo. in Supp., Ex. 1 at 1.) These actions were to be undertaken after the City acquired the property through its power of eminent domain, pursuant to Chapter 38 of the Revised Ordinances of

Honolulu 1990 and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion.

On August 3, 2004, the director of the Honolulu Department of Community Services determined that the public purpose of Chapter 38 would be effectuated by the acquisition of the leased fee interests in Discovery Bay, either by exercise of the power of eminent domain, or by purchase under the threat of eminent domain. (*See, e.g.*, Pl. Memo. in Supp., Ex. 28.) On November 24, the director of DCS designated Plaintiffs' leased fee interests in the real property and other common elements at Discovery Bay, for acquisition through the exercise of the power of eminent domain pursuant to R.O.H. § 38-2.2 and Rules § 2-11. *Id.*

Plaintiffs assert that, accordingly, Plaintiffs were determined by DCS to have met all the qualifications stated in Chapter 38 entitling them to purchase the leased fee interest in the real property appurtenant to their respective residential condominium units in Discovery Bay. In late October and early November of 2004, Plaintiffs received written notification of their final approval to proceed with the process provided in Chapter 38 for leasehold conversion. (*See, e.g.*, Pl. Memo. in Supp., Ex. 29.)

On August 2, 2004, Honolulu City Council Member Mike Gabbard introduced City Council Bill 04-53 ("Bill 53"), which was written to repeal Chapter 38. In section 1 of the bill, the City Council issued the following findings:

The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.

The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contains terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single ownership," and "potential for economic instability and disruption on Oahu" as public purpose furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has

> the right to abrogate it.... No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick*, 93 Haw. 329, 338 (1996).
>
> Based on the forgoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

(Def. Memo. in Opp'n, Ex. B at 1.)

Bill 53 provided a savings clause, however, for those lessee applicants who were already involved in the condemnation process under Chapter 38 when Bill 53 became law. The clause provides:

> Section 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH,as existing on the day before the effective date of this ordinance.

(Def. Memo. in Opp'n, Ex. B at 2.) The City Council's approval is the determinative event on which permission to continue the leasehold condominium conversion process under Chapter 38 hinges.

On November 10, 2004, City Council Member Donovan Dela Cruz introduced Resolution 04-341, which sought council authorization for the corporation council to initiate an eminent domain proceeding on behalf of Plaintiffs at Discovery Bay. (Pl. Memo. In Supp., Ex. 60.) Resolution 04-341 was referred to the council's Executive Matters Committee, which deferred consideration of the resolution pending the passage of Bill 53. On January 26, 2005, the Council voted 6-3 to pass Bill 53 into law.

Plaintiffs maintain that the City Council considered and rejected less drastic alternatives to Bill 53 in the months preceding the adoption of the Bill. Indeed, Plaintiffs note that City Council Member Charles Djou introduced a modified version of Bill 53 that would have preserved Plaintiffs' contracts while still effecting the repeal of Chapter 38. This version would have exempted a development that was validly designated before the effective date of Bill 53, and for which a sufficient number of lessees applied and executed leased fee purchase contracts with the City before the effective date of Bill 53. Djou's version, however, was rejected by a 6-3 vote on January 13, 2004.

Bill 53 became effective as Ordinance 05-001, and Chapter 38 was repealed, on February 7, 2005. Under the savings provision of Ordinance 05-001, only those lessee applicants who received council approval before February 7, 2005, are permitted to complete the process of leasehold condominium conversion under the provisions of Chapter 38. Plaintiffs, the lessee applicants at Discovery Bay, were unable to receive council approval prior to February 7, and therefore

they are unable under Ordinance 05-001 to complete their leasehold conversion.

PROCEDURAL HISTORY

Plaintiffs filed suit against the City on February 25, 2005, alleging that the repeal of Chapter 38 is unconstitutional, because: Bill 53 constitutes an impairment of the obligation of contracts in violation of Article 1, Section 10; Bill 53 constitutes a bill of attainder in violation of Article I, Section 10; Bill 53 deprives Plaintiffs of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Plaintiffs seek declaratory relief in the form of an order declaring the ordinance to be null and void as a violation of the Contracts Clause, the Due Process Clause, and 42 U.S.C. § 1983, and injunctive relief enjoining the implementation of the ordinance.

Plaintiffs filed a Motion for a Preliminary Injunction on March 11, 2005.

On April 4, the Court heard Plaintiffs' motion for a preliminary injunction. At the hearing, the Court denied Plaintiffs' motion, explaining that the lack of irreparable harm precluded the grant of preliminary injunctive relief. Rather, the Court explained that motions for summary judgment were the proper form for Plaintiffs' and Defendant's arguments, and ordered Plaintiffs to file a motion for summary judgment.

Plaintiffs filed their motion on April 25, 2005. On May 9, Defendant filed its Opposition. On May 16, Plaintiffs filed their reply in support of the motion.

On June 17, 2005, the parties filed a stipulation to consolidate the instant case with *Hsiung, et al., v. City and County of Honolulu,* CV. NO. 05-00104.

On July 19, 2005, after carefully considering the voluminous filings of the parties, the Court denied Plaintiffs' motion for summary judgment and ordered Defendant to file a motion for summary judgment.

On August 31, 2005, Defendant filed the instant motion for summary judgment. On October 7, Plaintiffs filed an opposition to the motion. Defendant filed a reply in support of their motion on October 14.

DISCUSSION

The Court, finding no cause to reconsider any portion of its July 19, 2005 order denying Plaintiffs' motion for surnmary judgment, adopts the reasoning more fully explicated in that order and addresses the additional arguments raised by Plaintiffs as follows.

In the July 19 order, the Court explained that Plaintiffs' Contracts Clause challenge must fail, because clear, binding precedent indicates that the reserved powers doctrine precludes contractual obligations from limiting a municipality's power of eminent domain. The reserved powers doctrine provides that "a state government may not contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996). The Court explained to the parties that, under the reserved powers doctrine, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust Co. of*

New York v. New Jersey, 431 U.S. 1, 23 (1977). Indeed, the United State Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535 (1848); *U.S. Trust Co. of New York*, 431 U.S. at 24, n. 21. The power of eminent domain, along with the police power, is often cited as the classic example of an "essential attribute of sovereignty." *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

In the July 19 Order, the Court also rejected Plaintiffs' arguments that their contracts do not limit the right of eminent domain, but rather Chapter 38 does, and alternatively that while a contract cannot prevent the exercise of eminent domain, contracts purporting to require the exercise of the eminent domain power are acceptable under the reserved powers doctrine. As the Court explained, these arguments are illusory, because the sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so.

Additionally, the Court concluded in the July 19 order that, because the reserved powers doctrine operates to preclude any contractual limitation on the City's power of eminent domain, the Court would not consider the arguments raised by the parties regarding whether a valid contract was formed.

In their opposition to Defendant's motion for summary judgment, Plaintiffs reiterate their arguments from their motion for summary judgment, and further argue that this Court has misinterpreted *U.S.Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977). The Court does not find that it has misinterpreted this case, and further finds no other reason to reconsider its order of July 19.

CONCLUSION

Therefore, for the reasons more fully explicated in this Court's order of July 19, 2005, the reasoning of which is incorporated herein, the Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 27 2005.

/s/
DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

Sally A. Matsuda. et al., v. City and County of Honolulu, CV. NO. 05-00125 DAE-LEK; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CV. NO. 05-000125 DAE-LEK

[Filed July 19, 2005]

SALLY A. MATSUDA, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CITY AND COUNTY OF HONOLULU,	)
	)
	)
Defendant.	)
	)

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Court heard Plaintiffs' Motion on June 22, 2005. David A. Nakashima, Esq., and Larisa L. Heroldt, Esq., appeared at the hearing on behalf of Plaintiffs; Deputies Corporation Counsel Don S. Kitaoka, Derek T. Mayeshiro, and Paul M. Iguchi, appeared at the hearing on behalf of Defendant. After reviewing the motion and the supporting and opposing

memoranda, the Court DENIES Plaintiffs' Motion for Summary Judgment.

BACKGROUND

Plaintiffs, who hold leasehold interests in residential condominiums at the Discovery Bay condominium complex, have sued Defendant, the City and County of Honolulu ("the City"), seeking to invalidate a city ordinance that Plaintiffs claim violates the Due Process Clause and the Contracts Clause of the United States Constitution.

Plaintiffs each hold legal title to their respective residential condominium units in the Discovery Bay condominium complex, which consists of several leasehold condominium units located at 1778 Ala Moana Boulevard, Honolulu, Hawaii. Plaintiffs individually entered into written Leased Fee Interest Purchase Contracts with the City. Plaintiffs each paid the City $1,000 in consideration, and in return, the City agreed as follows:

> The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (i) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and (b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Real Property").

(*See, e.g.*, Pl. Memo. in Supp., Ex. 1 at 1.) These actions were to be undertaken after the City acquired the property through its power of eminent domain, pursuant to Chapter 38 of the Revised Ordinances of Honolulu 1990 and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion.

On August 3, 2004, the director of the Honolulu Department of Community Services determined that the public purpose of Chapter 38 would be effectuated by the acquisition of the leased fee interests in Discovery Bay, either by exercise of the power of eminent domain, or by purchase under the threat of eminent domain. (*See, e.g.*, Pl. Memo. in Supp., Ex. 28.) On November 24, the director of DCS designated Plaintiffs' leased fee interests in the real property and other common elements at Discovery Bay, for acquisition through the exercise of the power of eminent domain pursuant to R.O.H. § 38-2.2 and Rules § 2-11. *Id.*

Plaintiffs assert that, accordingly, Plaintiffs were determined by DCS to have met all the qualifications stated in Chapter 38 entitling them to purchase the leased fee interest in the real property appurtenant to their respective residential condominium units in Discovery Bay. In late October and early November of 2004, Plaintiffs received written notification of their final approval to proceed with the process provided in Chapter 38 for leasehold conversion. (*See, e.g.*, Pl. Memo. in Supp., Ex. 29.)

On August 2, 2004, Honolulu City Council Member Mike Gabbard introduced City Council Bill 04-53 ("Bill

53"), which was written to repeal Chapter 38. In section 1 of the bill, the City Council issued the following findings:

> The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.
>
> The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contains terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single

ownership," and "potential for economic instability and disruption on Oahu" as public purpose furthered by Chapter 38.

The council finds that mandatory conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38 do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private

> grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it.... No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick,* 82 Haw. 329, 338 (1996).
>
> Based on the forgoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

(Def. Memo. in Opp'n, Ex. B at 1.)

Bill 53 provided a savings clause, however, for those lessee applicants who were already involved in the condemnation process under Chapter 38 when Bill 53 became law. The clause provides:

> Section 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance.

(Def. Memo. in Opp'n, Ex. B at 2.) The City Council's approval is the determinative event on which

permission to continue the leasehold condominium conversion process under Chapter 38 hinges.

On November 10, 2004, City Council Member Donovan Dela Cruz introduced Resolution 04-341, which sought council authorization for the corporation council to initiate an eminent domain proceeding on behalf of Plaintiffs at Discovery Bay. (Pl. Memo. In Supp., Ex. 60.) Resolution 04-341 was referred to the council's Executive Matters Committee, which deferred consideration of the resolution pending the passage of Bill 53. On January 26, 2005, the Council voted 6-3 to pass Bill 53 into law.

Plaintiffs maintain that the City Council considered and rejected less drastic alternatives to Bill 53 in the months preceding the adoption of the Bill. Indeed, Plaintiffs note that City Council Member Charles Djou introduced a modified version of Bill 53 that would have preserved Plaintiffs' contracts while still effecting the repeal of Chapter 38. This version would have exempted a development that was validly designated before the effective date of Bill 53, and for which a sufficient number of lessees applied and executed leased fee purchase contracts with the City before the effective date of Bill 53. Djou's version, however, was rejected by a 6-3 vote on January 13, 2004.

Bill 53 became effective as Ordinance 05-001, and Chapter 38 was repealed, on February 7, 2005. Under the savings provision of Ordinance 05-001, only those lessee applicants who received council approval before February 7, 2005, are permitted to complete the process of leasehold condominium conversion under

the provisions of Chapter 38. Plaintiffs, the lessee applicants at Discovery Bay, were unable to receive council approval prior to February 7, and therefore they are unable under Ordinance 05-001 to complete their leasehold conversion.

Plaintiffs filed suit against the City on February 25, 2005, alleging that the repeal of Chapter 38 is unconstitutional, because: Bill 53 constitutes an impairment of the obligation of contracts in violation of Article 1, Section 10; Bill 53 constitutes a bill of attainder in violation of Article 1, Section 10; Bill 53 deprives Plaintiffs of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Plaintiffs seek declaratory relief in the form of an order declaring the ordinance to be null and void as a violation of the Contracts Clause, the Due Process Clause, and 42 U.S.C. § 1983, and injunctive relief enjoining the implementation of the ordinance.

Plaintiffs filed a Motion for a Preliminary Injunction on March 11, 2005.

On April 4, the Court heard Plaintiffs' motion for a preliminary injunction. At the hearing, the Court denied Plaintiffs' motion, explaining that the lack of irreparable harm precluded the grant of preliminary injunctive relief. Rather, the Court explained that motions for summary judgment were the proper form for Plaintiffs' and Defendant's arguments, and ordered Plaintiffs to file a motion for summary judgment.

Plaintiffs filed their motion on April 25, 2005. On May 9, Defendant filed its Opposition. On May 16, Plaintiffs filed their reply in support of the motion.

On June 17, 2005, the parties filed a stipulation to consolidate the instant case with *Hsiung, et al., v. City and County of Honolulu,* CV. NO. 05-00104.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be entered when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986) (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970)). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *Id.* at 323.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec.*

Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986) (citation omitted).

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. *Id.* The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual quantum and quality of proof necessary to support liability under the applicable law. *Id.* at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. *See Celotex,* 477 U.S. at 322.

At the summary judgment stage, this Court may not make credibility determinations or weigh conflicting evidence. *Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: whether the evidence presents a sufficient

disagreement to require submission to a jury, or is so one-sided that one party must prevail as a matter of law. *Id.* (citation omitted).

DISCUSSION

As the Court expressed at the hearing on this motion, the Court sees before it a sad, unnecessary case. It is not the place of the Court to challenge the actions taken by the City Council in terms of wisdom or public policy, and this order will not purport to do so. However, the fair and wise decision, from the perspective of the City, would have been to draft the repeal of Chapter 38 so as to allow those leaseholders such as Plaintiffs, who have begun in good faith the process of conversion, to be grandfathered in. The integrity of the City Council members who reached this decision has never been doubted; however, the people of the City and County of Honolulu are ill-served by the avoidable waste of taxpayers' money that has resulted from this decision. Nonetheless, the duty of the Court is to uphold the Constitution and the republican form of government of the United States. The Court therefore addresses Plaintiffs' claims as follows.

Plaintiffs assert that the repeal of Chapter 38 constitutes a violation of the Contracts Clause, because it effects a substantial impairment of Plaintiffs' contracts with the City. However, Defendant argues that it is absolved from any liability based on an exception to the requirements of the Contracts Clause that has been carved out by the courts and referred to as the "reserved powers" doctrine. The reserved powers doctrine provides that "a state government may not

contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996).

Under the reserved powers doctrine, when a state impairs the obligation of its own contract, the initial inquiry concerns the ability of the state to enter into an agreement that limits its power to act in the future. *U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 23 (1977). This inquiry requires a determination as to the state's power to create irrevocable contract rights, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. *Id.* "In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *Id.*

Applying this standard, the United State Supreme Court has repeatedly held for more than a century that the Contracts Clause cannot be used to bind the state to a contract that purports to restrict its power of eminent domain. *See, e.g., West River Bridge Co. v. Dix,* 47 U.S. 507, 6 How. 507, 12 L.Ed. 535 (1848) (holding that the Contracts Clause does not prevent a State from exercising the power of eminent domain) ("This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."); *U.S. Trust Co. of N.Y.*, 431 U.S. at 24, n. 21 ("[T]he doctrine that a State cannot contract away the power of eminent domain has been established since *West River Bridge Co. v. Dix.* . . . "); *Winstar Corp.*, 518 U.S. at 874 (citing *West River*

Bridge for the proposition that "a state's contracts do not surrender its eminent domain power"). Indeed, the power of eminent domain, along with the police power, is often cited as the classic example of an "essential attribute of sovereignty." *U.S. Trust Co. of New York*, 431 U.S. at 23-24.

Indeed, the federal courts' answer to the argument presented by Plaintiffs was already a foregone conclusion almost a century ago, as the Supreme Court explained:

> There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties . . . . [I]t is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation for a public purpose comes within this general doctrine.

Contributors to Pennsylvania Hosp. v. City of Pa., 245 U.S. 20, 23-24 (1917) (internal citations omitted). The Supreme Court's long line of precedent on the subject also shows that the reserved powers doctrine applies equally to protect the right of eminent domain from

contractual infringement when that right has been delegated to a municipality. *See, e.g., Contributors to Pa. Hosp.,* 245 U.S. at 23-24 (applying the reserved powers doctrine to the exercise of eminent domain by a municipality). In the instant case, the state legislature delegated its power of eminent domain to the City and County of Honolulu in Hawaii Revised Statute § 46-1.5(6).

In recent years, the Supreme Court has taken no action that would undermine this longstanding authority. Rather, the Court's latest decisions regarding the power of eminent domain have only bolstered the "longstanding policy of deference to legislative judgments in this field." *See, e.g., Kelo v. City of New London,* 125 S. Ct. 2655, 2663 (2005). In *Kelo,* the United States Supreme Court was faced with a factually distinguishable scenario from the one at hand; the petitioners in that case were landowners who sought to challenge a city's exercise of eminent domain power over their property, arguing that the takings were not for public use. *Kelo,* 125 S. Ct. at 2658-2661. However, in affirming the city's finding of public purpose that underlaid its exercise of eminent domain, the Supreme Court once again evidenced the wide berth afforded to states and municipalities in the exercise of that particular sovereign power. Reiterating its pronouncement in *Haw. Hous. Auth. v. Midkiff,* 467 U.S. 229, 242 (1984), the Court in *Kelo* explained: "When the legislature's purpose is legitimate, and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings ... are not to be carried out in the federal courts." *Kelo,* 125 S. Ct. at 2667.

Plaintiffs simply have not brought forth any argument that would persuade the Court that this clear Supreme Court precedent is somehow inapplicable to the facts of this case. Plaintiffs assert that their contracts do not limit the right of eminent domain, but rather Chapter 38 does. Alternatively, Plaintiffs argue that the aforementioned cases only stand for the proposition that a contract cannot prevent the exercise of eminent domain; contracts purporting to require the exercise of the eminent domain power are therefore acceptable under the reserved powers doctrine, Plaintiffs contend. These arguments are illusory. The sovereign right of eminent domain necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest. A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so. Although factually distinguishable, the Supreme Court's recent decision in *Kelo* may be construed as support for the proposition that a legislature's power of eminent domain necessarily encompasses the ability to both exercise the right and to limit the right. *Kelo,* 125 S.Ct. at 2668 ("In affirming the City's authority to take petitioners' properties, ... [w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."). Thus, the Court finds that the Contracts Clause cannot be used under these circumstances to invalidate the repeal of Chapter 38, because the reserved powers doctrine reserves essential attributes of sovereignty such as the power of eminent domain to the discretion of the states.

Because the Court finds that the reserved powers doctrine applies to create an exception to the Contract Clause analysis, the Court does not consider the parties' arguments regarding the unmistakability doctrine. The so-called unmistakability doctrine provides that a sovereign will only be held to have surrendered its sovereign powers if the contractual limitation explicitly states as much. "Without regard to its source, sovereign power, even when unexercised is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in *unmistakable* terms." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment,* 477 U.S. 41, 52 (1986) (emphasis added). As noted above, however, the Supreme Court has also indicated that, under the reserved powers doctrine, a sovereign can never be contractually bound to surrender "an essential attribute of its sovereignty." *United States Trust Co. of N.Y.,* 431 U.S. at 23. The Supreme Court explained the two doctrines, which emerged in the mid-Nineteenth Century, as follows:

> [T]wo distinct limitations developed to protect state regulatory powers. One came to be known as the 'reserved powers' doctrine, which held that certain substantive powers of sovereignty could not be contracted away. *See West River Bridge Co. v. Dix,* 6 How. 507, 12 L.Ed. 535 (1848) (holding that a State's contracts do not surrender its eminent domain power). The other, which surfaced somewhat earlier in *Providence Bank v. Billings*, 4 Pet. 514, 7 L.Ed. 939 (1830), and *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 11 Pet. 420, 9 L.Ed. 773 (1837), was a canon of

> construction disfavoring implied governmental obligations in public contracts. Under this rule that "[a]ll public grants are strictly construed," we have insisted that "[n]othing can be taken against the State by presumption or inference," and that "neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."

Winstar Corp., 518 U.S. at 874-75. The Court finds that the only reasonable way to read the two doctrines together is to hold that the unmistakability doctrine applies to require any contractual limitations on a sovereign's powers to be drafted in unmistakable terms, but that under the reserved powers doctrine, a subset of these sovereign powers are so essential that they may never be contractually limited, regardless of the language used. *See also Winstar Corp.*, 518 U.S. at 889 n. 34 (addressing action against the federal government rather than a state, but discussing at length the doctrine of unmistakability and indicating there are " 'core governmental powers' that cannot be surrendered under the reserved powers doctrine"). As such, given that the Court has found that the sovereign's discretion to use the eminent domain power is protected under the reserved powers doctrine, the doctrine of unmistakability is simply inapplicable.

Moreover, because the Court concludes that the reserved powers doctrine operates to preclude any contractual limitation on the City's power of eminent domain, the Court declines to consider the arguments

raised by the parties regarding whether a valid contract was formed.

CONCLUSION

The Court therefore finds that the City Council acted within its appropriate constitutional and legal limits in repealing Chapter 38. The Plaintiffs' Motion for Summary Judgment is hereby DENIED. The Defendant is directed to file a motion for summary judgment consistent with this opinion.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 19, 2005 .

/s/
DAVID ALAN EZRA
CHIEF UNITED STATES
DISTRICT JUDGE

Sally A. Matsuda, et al., v. City and County of Honolulu, CV. NO. 05-00125 DAE-LEK; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

APPENDIX E

ORDINANCE NO. 91-95 BILL NO. 156 (1990)
CD-1, FD-1

A BILL FOR AN ORDINANCE RELATING TO RESIDENTIAL CONDOMINIUM AND COOPERATIVE LEASEHOLD CONVERSION FOR REAL PROPERTY SITUATED IN THE CITY AND COUNTY OF HONOLULU.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

Tbe Council finds that:

(a) The historical pattern of landownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees residing in residential condominium apartments, cooperative housing units and planned developments situated on such land and who have instead engaged in the practice of leasing such proportionate shares of their lands to such lessees under long-term leases.

Runaway land prices, especially in the last three years, have put housing costs well beyond the means of a large segment of the population. These prices are driving up new leasehold ground rents (lease rents) that in large measure are based upon present fee values.

Under the terms of most residential leases, the renegotiated lease rent amount is typically based on land values existing at the time of renegotiation. As a result, the acute recent inflation of land costs has adversely affected lease rent negotiations of persons who have purchased leasehold multi-family units as their homes: in some instances renegotiations have resulted in lease rents that have increased over 1,000 percent. Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes. If they are displaced from these homes, these owner-occupant lessees could be displaced entirely from the ranks of home-owners because of Oahu's continuing housing crisis. Therefore, there is a desire by many lessees to convert to fee ownership. At the present time, there are approximately16,000 – 17,000 residential condominium, cooperative and planned development units on leased land on Oahu.

The refusal of such landowners to sell proportionate shares in their fee simple titles to their lands to such lessees and cooperative owners and the pervasiveness of such practice of leasing rather than selling such shares in the land has resulted in a

serious shortage of fee simple residential condominium land, cooperative housing unit land and planned development land and in an artificial inflation of the value of such land on Oahu.

Due to such shortage of fee simple residential condominium, cooperative and planned development land and such artificial inflation of such land values, many people on Oahu have been deprived of a choice to own an interest in or take a lease of the land on which their residential condominium, cooperative and planned development homes are situated and have been required instead to pay exorbitant leased fee purchase prices for a proportionate fee simple ownership share in such land. These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

The acquisition by people, who are lessees and owners of condominium apartments, cooperative housing units and planned development units, of proportionate shares of the land on which their homes are situated in fee simple, at fair and reasonable prices and the ability of such lessees and owners to fully enjoy such land through proportionate ownership of such land in fee simple will alleviate these conditions and will promote the economy of Oahu and public interest, health, welfare, security and happiness of such lessees and owners.

There is a close relationship between the monetary values accorded land on Oahu and the stability and strength of Oahu's economy as a whole. Residential condominium, cooperative housing and planned development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew Oahu's economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high residential condominium, cooperative housing and planned development land values creates a potential for economic instability and disruption on Oahu. Economic inflation, instability and disruptions on Oahu have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and avoiding disadvantageous economic disruptions all are productive of general benefit to all members of Oahu's community.

The sound and wise conservation, preservation, use and management of residential condominium, cooperative housing and planned development land cannot be separated from the subject of patterns of residential condominium, cooperative and planned development land ownership. To accomplish the public purpose of wisely conserving, preserving, using, and managing residential condominium, cooperative housing and planned development land on Oahu requires changing present patterns of residential condominium, cooperative housing and residential planned development land ownership. Changing present patterns of such land ownership on Oahu by allowing residential condominium lessees, cooperative housing unit owners and planned development

housing owners under leases of such land to purchase in fee simple, a proportionate share of such land on which their homes are situated through the exercise of the City's power of eminent domain to acquire such fee simple interest to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City, will help to satisfy the pressing public necessity for a secure, strong and stable Oahu economy.

The use of the City's eminent domain power to condemn the fee simple title to residential condominium, cooperative housing units and residential planned development land and the payment of just compensation therefor for the purpose of making proportionate shares of the fee simple title thereto and the use thereof available for acquisition by people who are condominium lessees, cooperative housing unit owners and owners of planned development units under leases of such land on which their homes are situated, or who face imminent expiration of such leases and the potential surrender, altogether, of title to and possession of their residential condominium apartments, cooperative housing units and planned development units in accordance with such leases is for a public use and purpose.

The power of the City to use eminent domain to effectuate the purposes and objectives of this Bill is granted to the City under Sections 46-1.5(6), (13) and (16) and Chapter 101, Hawaii Revised Statutes.

(b) It is therefore declared to be necessary and it is the purpose of this Ordinance to alleviate the conditions found in subsection (a) of this Ordinance by providing for the right of any person who is a lessee or owner under a long-term lease of residential condominium, cooperative housing unit or residential planned development land on Oahu to purchase at a fair and reasonable price a proportionate share of the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the City through the use of its eminent domain power and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds and the use of private funds which are at the disposal of the City.

SECTION 2. The Revised Ordinances of Honolulu is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER ___.
RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION.

ARTICLE 1. GENERAL PROVISIONS.

Sec. __-1.1. Purpose. The purpose of this Chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii

Revised Statutes, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land.

Sec. __-1-2. Definitions. Unless otherwise clear from the context, as used in this Chapter:

"Association of apartment owners" has the same meaning as in section 514A-3, Hawaii Revised Statutes.

"City" means the City and County of Honolulu.

"Condominium" means an residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in Chapter 514A, Hawaii Revised Statutes, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used family or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under Chapter 514A, Hawaii Revised Statutes.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative owner" means the owner of a cooperative.

"Cooperative housing corporation" means a corporation which satisfies the requirements of section 519-3(d)(1), Hawaii Revised Statutes, or of Chapter 421H, Hawaii Revised Statutes, and the requirements of section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the City department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means an area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to Chapter 514A, Hawaii Revised Statutes, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation.

(3) Contains or is intended to contain a residential planned unit development project.

To qualify as a development, there shall be ten or more residential condominium apartment units, cooperative

housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, successors, legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit, residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives, and assigns.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this Chapter, means the same as the term "lessee" as used in this Chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by Chapter 516, Hawaii Revised Statutes.

The terms "lessors", "lessees", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and the terms also include corporations, firms, associations, trusts, estates, and

the State and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

The term "owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the Department.

The term "owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves at the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee;

provided that the individual shall retain complete possessory control of the premises of the unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the Department.

For purposes of this Chapter, the terms "residential condominium apartment", "residential condominium housing unit", "residential cooperative housing unit", "residential cooperative apartment unit", or "residential planned development unit" shall not include the following:

(1) a unit used for commercial purposes;
(2) a unit used as a time share unit or transient vacation unit, as defined under chapter 21A, article 9; or
(3) any other nonresidential condominium, cooperative, or planned development unit.

Sec . __-1.3. Applicability. This Chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under Chapter 514A, Hawaii Revised Statutes, cooperative housing units projects or residential planned development projects owned or held privately or by the City and County of Honolulu or by the State, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government.

This Chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under Chapter 480, Hawaii Revised Statutes.

Sec. __-1.4. No estoppel or waiver. The rights granted to lessees by this Chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this Chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant, contract, bylaw or article of incorporation contrary to the intent or purpose of this Chapter shall be void.

Sec. __-1.5. Trusts and estates. The rights granted to lessees by this Chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this Chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required by this Chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this Chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant

to this Chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust.

Sec. __-1.6. Penalty. Any person who violates any provision of this Chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by section __-6.1.

Sec. __-1.7. Administration of Chapter. The department of housing and community development shall administer this Chapter.

Sec. __-1.8. Department's duties, generally. In addition to any other duty prescribed by law and in this Chapter, the director of the department of housing and community development shall:

(1) Within six months after the effective date of this Chapter, adopt in accordance with Chapter 91, Hawaii Revised Statutes, rules necessary to effectuate the purposes of this Chapter;

(2) Be responsible for enforcement of this Chapter and the rules adopted pursuant to it;

(3) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(4) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing

developments and residential planned developments in order that this Chapter may be understood and effectively implemented;

(5) Conduct an investigation upon any written complaint or whenever it appears that a provision of this Chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that any person has violated or is violating this Chapter, the director may order the person to cease and desist from continuing the violation or engaging in or doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the city and county of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(6) Facilitate the acquisition of all necessary -- property -- interests by the city through eminent domain proceedings as provided in this Chapter;

(7) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the city under this Chapter;

(8) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this Chapter; and

(9) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this Chapter.

Sec. __-1.9. Quitclaim deeds. Unless otherwise provided by law, the City shall issue quitclaim deeds whenever it conveys, transfers, sells, or assigns any property developed, constructed, or sponsored under this Chapter.

ARTICLE 2. CONDEMNATION OF CONDOMINIUM DEVELOPMENT LEASEHOLDS.

Sec. __-2.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are:

(1) Developed into condominium property regimes or occupied by residential lessees under leases or condominium conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into condominium property regimes occupied or to be occupied by residential lessees under apartment leases or condominium conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of the leases to units in the condominium have been executed.

Sec. __-2.2. Designation of developnent for acquisition.

(a) Subject to subsection (b), the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twentyfive (25) of all the condominium owners within the development or at least owners of fifty percent (50%) of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to section __-2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days,

the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this Chapter.

For purposes of this subsection, "condominium owners" means the owner-occupants of the condominium development.

(b) The land designated and acquired by the City may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

Sec. __-2.3. Purchase of leased fee interest. The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the City, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessees' condominium units, subject to the terms, covenants, and conditions of the contract executed with the City. If any lessee refuses to enter into such a contract, then in that event, such lessee shall pay to the City all costs incurred by the City in the acquisition of the appurtenant condominium

leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the condominium.

Sec. __-2.4. Qualification for purchase. (a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the

city and county of Honolulu or have pending before the State housing finance and development corporation, or the City department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu;

(5) submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-2.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this Chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. __-2.6. Preliminary negotiation required. (a) Upon the filing with the department of an application by the lessees in accordance with Sec. __--2.2(a)(1) of this Article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section __-2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section __-2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-2.7. Eminent domain trial. The parries to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, and the lessors and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 3.CONDEMNATION OF COOPERATIVE HOUSING DEVELOPMENT LEASEHOLDS.

Sec. __-3.1. Applicability. This Article applies to developments which, at the time of acquisition of the development by the City, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this Chapter; provided that ninety per cent of the proprietary leases to the cooperative have been executed.

Sec. __-3.2. Designation of development for acquisition.

(a) Subject to subsection (b), the department may designate all of a development for acquisition, and facilitate the acquisition of the leased fee interests in the development by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to section __-3.4 after the

cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this Article will effectuate the public purposes of this Chapter.

(b) The development designated and acquired by the City shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development", "cooperatives", or similar terms when used in this Article, including the provisions on acquisition, disposal, and financing of cooperatives and developments, shall be construed to apply only to the residential units.

Sec. __-3.3. Purchase of leased fee interest. The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the City within sixty days of acquisition of the interest by the

City, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the City provided that:

(1) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the City all costs incurred by the City in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs;

(2) In case of a wilful breach of the purchase agreement, the City shall be entitled to any available remedy, including the sale of its interest in the cooperative.

Sec. __-3.4 Qualification for lease or purchase. (a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corporation have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the City for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least sixty per cent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a wilful breach of contract by the cooperative housing corporation, the City may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false

statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-3.5. Deposits by lessees. (a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department for the purchase of the leased fee interest pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

Sec. __-3.6. Preliminary negotiation required. (a) Upon the filing of a petition by the cooperative housing corporation with the department, the department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other

documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of section __-3.4(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to section __-3.4(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-3.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 4. CONDEMNATION OF RESIDBHTXAL PLANNED DEVELOPMENT LEASEBOLDS.

Sec. __-4.1. Applicability. This Article applies to residential planned developments which, at the time of acquisition of the development by the City, are:

(1) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned development conveyance documents executed before the effective date of this Chapter; or

(2) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this Chapter; provided that ninety per cent of such leases to the planned unit development have been executed.

Sec. __-4.2. Designation of development for acquisition. (a) Subject to subsection (b), the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the City through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least twenty-five (25) of all the owners within the development or at least owners of fifty percent (50%) of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to section __-4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the city and county of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part will effectuate the public purposes of this Chapter. For purposes of this subsection, "owners", as used in Sec. __ -4.2(a)(1) means the owner-occupants of the planned developments.

(b) The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

Sec. __-4.4 Purchase of leased fee interest. The planned development lessees, who have authorized approval and who have qualified for purchase of the

leased fee interest, shall purchase from the city within sixty days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter into such a contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development.

Sec. __-4.4. Qualification for purchase. (a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least eighteen years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the city and county of Honolulu ;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the

leased property applied for; provided that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the city and county of Honolulu or have pending before the State housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands herein if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the city and county of Honolulu ;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the City promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under Chapter 91, Hawaii Revised Statutes, to effectuate the purposes of this section.

Sec. __-4.5. Deposits by lessees. (a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this Chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

Sec. __-4.6. Preliminary negotiation required. (a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of section __-4.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary

negotiations as provided for in this section, for setting qualifications amounts pursuant to section __-4.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this Chapter.

Sec. __-4.7. Eminent domain trial. The parties to the eminent domain action brought under this Chapter shall be the City as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired.

ARTICLE 5. DOMAIN.

Sec. __-5.1. Applicability. This article applies to developments which are created by condominium property regimes under Chapter 514A, Hawaii Revised Statutes, and to developments existing under cooperative housing corporation status, and to residential planned developments not covered by Chapter 516, Hawaii Revised Statutes.

Sec. __-5.2. Exercise of power of eminent domain. Within twelve months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development by the city and county of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire

the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of the land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation.

Sec. __-5.3. Compensation. The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain.

Sec. __-5.4. Interest acquired. (a) Upon acquisition of a development or portion thereof as provided in this article, the property interest acquired by the City is all of the right, title, and interest of the fee owner, and of the lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent necessary to avoid any impairment of the leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the fee and merger as provided in this Chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

Sec. __-5.5. Interest in compensation paid by the City. The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the City as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled

to share in the lease rentals shall share in the compensation paid by the City to the extent of the persons's interest as may be determined by agreement of those entitled to share in the compensation paid by the City and in the absence of such agreement pursuant to Chapter 658, Hawaii Revised Statutes.

Sec. __-5.6. Compulsory or involuntary conversion. It is the intent of the council, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of Chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the City under this part shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or in part of any provision of this Chapter or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this Chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business.

ARTICLE 6. REVOLVINGFUND.

Sec. __-6.1. Fee simple condominium and cooperative and planned & development revolving fund. A fee simple condominium and cooperative and planned unit development revolving fund is hereby created. The funds appropriated for the purposes of this Chapter and all moneys received or

collected by the department of housing and community development under this Chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this Chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees."

SECTION 3. If any article, section, sentence, clause, or phrase of this Chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining articles, sections, sentences, clauses, and phrases of this Chapter, or the application of this Chapter to other persons or transactions or circumstances, shall not be affected. The council hereby declares that it would have passed this Chapter and each article, section, clause, or phrase thereof, irrespective of the fact that any one or more articles, sections, sentences, clauses, or phrases of this Chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid.

SECTION 4. This ordinance shall take effect on January 1, 1992.

INTRODUCED BY:

John Henry Felix

_____

_____

Councilmembers

DATE OF INTRODUCTION:

December 28, 1990
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

_____
Deputy corporation Counsel

APPROVED this ____, day of _____, 1991.

_____
FRANK F. FASI, Mayor
City and County of Honolulu

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

CERTIFICATE

I HEREBY CERTIFY that Bill No. 156 (1990) was passed on first reading on January 30, 1991; second reading on June 19, 1991; third reading, as amended to CD-1, FD-1, on December 4, 1991; and that it was published in the Honolulu Advertiser on June 22, 1991.

I FURTHER CERTIFY that on December 5, 1991 said Bill No. 156 (1990), CD-1, FD-1, was presented to the Honorable Frank F. Fasi, Mayor of the City and County of Honolulu, for his approval or otherwise; and

that on December 16, 1991, the Mayor returned said Bill without his signature; therefore, pursuant to Section 3-203 of the Revised Charter of Honolulu, said Bill No. 156 (1990), CD-1, FD-1, became a duly enacted ordinance on December 16, 1991 to become effective January 1, 1992.

DATED, Honolulu, State of Hawaii, this 18th day of December, 1991.

COUNCIL OF THE CITY AND
COUNTY OF HONOLULU

By /s/_____
ARNOLD MORGADO, JR.
Chair and Presiding Officer

ATTEST :

/s/_____
RAYMOND K. PUA
City Clerk

APPENDIX F

Chapter 38

RESIDENTIAL CONDOMINIUM, COOPERATIVE HOUSING AND RESIDENTIAL PLANNED DEVELOPMENT LEASEHOLD CONVERSION

Articles:

1. General Provisions
2. Condemnation of Condominium Development Leaseholds
3. Condemnation of Cooperative Housing Development Leaseholds
4. Condemnation of Residential Planned Development Leaseholds
5. Eminent Domain
6. Revolving Fund

Article 1.
General Provisions

Sections:

38-1.1 Purpose.
38-1.2 Definitions.
38-1.3 Applicability.
38-1.4 No estoppel or waiver.
38-1.5 Trusts and estates.
38-1.6 Violation–Penalty.
38-1.7 Administration of chapter.
38-1.8 Department powers and duties.

38-1.9 Quitclaim deeds.

Sec. 38-1.1 Purpose.

The purpose of this chapter is to establish the right of any person, who is a lessee under any long-term lease of land upon which is situated either residential condominium property regime projects created under HRS Chapter 514A, cooperative housing unit projects or residential planned development projects, to purchase at a fair and reasonable price the fee simple title to such land. (Added by Ord. 91-95)

Sec. 38-1.2 Definitions.

Unless otherwise clear from the context, as used in this chapter:

"Association of apartment owners" has the same meaning as in HRS Section 514A-3.

"City" means the City and County of Honolulu.

"Condominium" means a residential apartment, together with an appurtenant undivided interest in common elements, located on land subject to a declaration of condominium property regime as defined in HRS Chapter 514A, together with an appurtenant undivided interest in common elements, both used or occupied, or developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for a single family.

"Condominium property regime" means a condominium property regime project established under HRS Chapter 514A.

"Cooperative" means a residential apartment in a housing project held, owned, or leased by a cooperative housing corporation.

"Cooperative owner" means the owner of a cooperative.

"Cooperative housing corporation" means a corporation which satisfies the requirements of HRS Section 519-3(d)(1), or of HRS Chapter 421H, and the requirements of Section 216 of the Internal Revenue Code of 1986, as amended.

"Department" means the city department of housing and community development created by Article 6, Chapter 10, Revised Charter of the City and County of Honolulu 1973, as amended.

"Development" means the area of land, irrespective of size, which:

(1) Is subject to a declaration of condominium property regime pursuant to HRS Chapter 514A, which condominium property regime contains or is intended to contain condominium apartment units occupied or to be occupied under apartment leases or condominium conveyance documents; or

(2) Contains or is intended to contain a cooperative housing unit project held, owned or leased by a cooperative housing corporation;

(3) Contains or is intended to contain a residential planned unit development project;

To qualify as a development, there shall be 10 or more residential condominium apartment units, cooperative housing apartment units or residential planned development housing units on the land.

"Director" means the director of the department of housing and community development.

"Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy land

or an interest in land would pay to an owner willing, but not obliged, to sell the land or interest in land in an open market, taking into consideration all uses to which the land is adapted or might in reason be applied.

"Fee owner" means the person who owns the fee simple title to the land leased under an apartment lease, condominium conveyance document, or proprietary lease, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and the person's heirs, successors, legal representatives, and assigns.

"Lease" means the conveyance of land or an interest in land by a fee simple owner as lessor, to a lessee or sublessee, or by any other person as sublessor to any person, in consideration of payment of rent or other recompense. With respect to a cooperative, lease means a ground lease to the cooperative housing corporation and not leases to the individual apartment unit owners.

"Leased fee" and "leased fee interest" mean reversionary interests of the fee owner, lessor, and all legal and equitable owners of land which is leased, other than the lessee's or sublessee's interest.

"Legal and equitable owners" means the fee simple owner and all persons having legal or equitable ownership interests in the leased fee or in the lessor's leasehold estate, including mortgagees, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

"Lessee" means any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit,

residential cooperative housing unit or residential planned development unit.

"Lessor" means any person who leases or subleases land to another, and the person's heirs, successors, legal representatives and assigns.

The terms "lessors," "lessees," "fee owner," and "legal and equitable owners" mean and include individuals, both masculine and feminine, and the terms also mean and include corporations, firms, associations, trusts, estates, and the state and the City and County of Honolulu. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

"Owner-occupant" means any individual in whose name sole or joint legal title is held in a residential condominium unit, residential cooperative apartment unit or residential planned development unit which, simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided, that the individual shall retain complete possessory control of the premises of the residential unit during these periods. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held. Proof of residency and possessory control shall be as established by rules adopted by the department.

"Owner-occupant-shareholder" means any individual who is a sole or joint legal owner of shares in a cooperative housing corporation or trust and

leases a cooperative apartment unit which, simultaneous to the individual being a shareholder, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee; provided, that the individual shall retain complete possessory control of the premises of the unit during these periods. An individual shall not be deemed to have complete possessory control of the premises of the unit if the individual rents, leases, or assigns the premises for any period of time to any other person who is not a shareholder and does not have a proprietary lease to the cooperative apartment unit. Proof of residency and possessory control shall be as established by rules adopted by the department.

"Person" means any person who leases or subleases land from a lessor and, for purposes of this chapter, means the same as the term "lessee" as used in this chapter.

"Planned development" means a housing development project, also known as a cluster housing development or planned unit development, where the apartment owner holds a leasehold interest in the lot under his or her unit, and provided that this interpretation excludes any planned unit development covered by HRS Chapter 516.

"Residential condominium apartment," "residential condominium housing unit," "residential cooperative housing unit," "residential cooperative apartment unit," or "residential planned development unit," for purposes of this chapter, do not mean and include the following:

(1) A unit used for commercial purposes;

(2) A unit used as a time-share unit or transient vacation unit as defined under Chapter 21, Article 10; or

(3) Any other nonresidential condominium, cooperative, or planned development unit.

(Added by Ord. 91-95)

Sec. 38-1.3 Applicability.

This chapter applies to all lands, in the City and County of Honolulu on which are situated either residential condominium property regime projects created under HRS Chapter 514A, cooperative housing units projects or residential planned development projects owned or held privately by the City and County of Honolulu or by the state, except Hawaiian home lands subject to Article XII of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to condominium apartment owners, cooperative housing corporations or owners of residential planned development units, including those available under HRS Chapter 480. (Added by Ord. 91-95)

Sec. 38-1.4 No estoppel or waiver.

The rights granted to lessees by this chapter shall be effective, notwithstanding any provision in any lease, contract, covenant, bylaw, or articles of incorporation to the contrary. No lessee shall be estopped by any covenant, term, condition, or contract, however worded, from claiming the rights granted by this chapter, or otherwise be deemed to have waived those rights. Any provision in any lease, covenant,

contract, bylaw or article of incorporation contrary to the intent or purpose of this chapter shall be void. (Added by Ord. 91-95)

Sec. 38-1.5 Trusts and estates.

The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether the tenancy, fee, estate, or trust was in effect prior to the effective date of this chapter or is created hereafter; and the life tenant, holder, officer, or trustee of any tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding 20 years and shall perform all acts required by this chapter. Every instrument of this type now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner, while acting pursuant to this chapter, shall be deemed to be acting in bad faith or to have committed a breach of trust. (Added by Ord. 91-95)

Sec. 38-1.6 Violation–Penalty.

Any person who violates any provision of this chapter shall be fined not more than $1,000.00 or imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple fund created by Section 38-6.1. (Added by Ord. 91-95)

Sec. 38-1.7 Administration of chapter.

The department of housing and community development shall administer this chapter. (Added by Ord. 91-95)

Sec. 38-1.8 Department powers and duties.

In addition to any other duty prescribed by law and in this chapter, the director of the department of housing and community development shall:

(a) Within six months after the effective date of this chapter, adopt in accordance with HRS Chapter 91, rules necessary to effectuate the purposes of this chapter;
(b) Be responsible for enforcement of this chapter and the rules adopted pursuant to it;
(c) Establish reasonable fees to be assessed and collected from lessees for the services of any appraiser;
(d) Disseminate information and render assistance to lessees of residential condominiums, cooperative housing developments and residential planned developments in order that this chapter may be understood and effectively implemented;
(e) Conduct an investigation upon any written complaint or whenever it appears that a provision of this chapter has been or is being violated. In the investigation, the director may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the director finds from satisfactory evidence that

any person has violated or is violating this chapter, the director may order the person to cease and desist from continuing the violation or engaging in doing any act or acts in furtherance thereof and, where necessary, the director may bring an action in the name of the City and County of Honolulu in any court of competent jurisdiction for enforcement of its orders;

(f) Facilitate the acquisition of all necessary property interests by the city through eminent domain proceedings as provided in this chapter;

(g) Facilitate the making and execution of contracts, mortgages, and other instruments necessary or convenient to the exercise of powers of the city under this chapter;

(h) From time to time, require from the lessors of leases of residential condominiums, cooperative housing developments and residential planned developments and from all fee owners and legal and equitable owners of such condominiums, cooperatives and planned developments subject to leases of land, such information as it may reasonably require in connection with the administration of this chapter; and

(i) Do all things necessary and convenient to carry out the powers expressly conferred upon the director by this chapter.

(Added by Ord. 91-95)

Sec. 38-1.9 Quitclaim deeds.

Unless otherwise provided by law, the city shall issue quitclaim deeds whenever it conveys, transfers,

sells or assigns any property developed, constructed, or sponsored under this chapter. (Added by Ord. 91-95)

Article 2. Condemnation of Condominium Development Leaseholds

Sections:

38-2.1 Applicability.
38-2.2 Designation of development for acquistion.
38-2.3 Purchase of leased fee interest.
38-2.4 Qualification for purchase.
38-2.5 Deposits by lessees.
38-2.6 Preliminary negotiation required.
38-2.7 Eminent domain trial.

Sec. 38-2.1 Applicability.

This article applies to developments which, at the time of acquisition of the development by the city, are:

(a) Developed into condominium property regimes or occupied by residential lessees under leases of condominium conveyance documents executed before the effective date of this chapter; or

(b) Developed or partially developed into condominium property regimes occupied or to be occupied by residential leases under apartment leases or condominium conveyance documents executed on or after the effective date of this chapter; provided, that 90 percent of the leases to units in the condominium have been executed.

(Added by Ord. 91-95)

Sec. 38-2.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least 25 of all the condominium owners within the development or at least owners of 50 percent of the condominium units, whichever number is less, apply to the department to purchase the leased fee interest pursuant to Section 38-2.4, and file an application with the department; and

(2) Due notice is given and a public hearing held, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication not being less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this part, will effectuate the public purposes of this

chapter. For purposes of this subsection, "condominium owners" means the owner-occupants of the condominium development.

(b) This land designated and acquired by the city may consist of a portion of or the entirety of the land area submitted to the declaration of condominium property.

(Added by Ord. 91-95)

Sec. 38-2.3 Purchase of leased fee interest.

The condominium lessees who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest of the city, the leased fee interest appertaining to their condominiums, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to the lessee's condominium units, subject to the terms, covenants, and conditions of the contract executed with the city. If any lessee refuses to enter into such a contract, then in that event, such lessee shall pay to the city all costs incurred by the city in the acquisition of the appurtenant condominium leased fee interest within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided further, that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the condominium. (Added by Ord. 91-95)

Sec. 38-2.4 Qualification for purchase.

(a) No sale of any condominium land within a development shall be made unless the lessees:

(1) Are at least 18 years of age and are owner-occupants of their condominium units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale, have an equitable interest in a condominium situated on the leased property applied for; provided, that for the purpose of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction.

(4) Do not own property in fee simple lands suitable for residential purposes within the City and County of Honolulu or having pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse

(unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest, in a land trust in the City and County of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the city promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91, to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-2.5 Deposits by lessees.

(a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their condominiums pursuant to this chapter. The means of determining the amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

(Added by Ord. 91-95)

Sec. 38-2.6 Preliminary negotiation required.

(a) Upon the filing with the department of an application by the lessees in accordance with Section 38-2.2(a)(1) of this article, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers

together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of Section 38-2.4(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the condominium development which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualification amounts pursuant to Section 38-2.4(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial shall not be discoverable, usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-2.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the lessees, and the lessors and all other necessary parties

as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 3. Condemnation of Cooperative Housing Development Leaseholds

Sections:

38-3.1 Applicability.
38-3.2 Designation of development for acquistion.
38-3.3 Purchase of leased fee interest.
38-3.4 Qualification for lease or purchase.
38-3.5 Deposits by lessees.
38-3.6 Preliminary negotiation required.
38-3.7 Eminent domain trial.

Sec. 38-3.1 Applicability.

This article applies to developments which, at the time of acquisition of the development by the city, are leased to cooperative housing corporations that sublease individual apartments to residential lessees under proprietary leases executed either prior to or after the effective date of this chapter; provided that ninety percent of the proprietary leases to the cooperative have been executed. (Added by Ord. 91-95)

Sec. 38-3.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all of a development for acquisition, and facilitate the acquisition of

the leased fee interests in the development by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after:

(1) The cooperative housing corporation applies to the department to purchase the leased fee interest pursuant to Section 38-3.4 after the cooperative housing corporation receives approval from its shareholders; and

(2) If, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this article will effectuate the public purposes of this chapter.

(b) The development designated and acquired by the city shall consist of the entire land parcel leased to a cooperative housing corporation.

(c) Where the cooperative housing development consists of both residential and nonresidential units, the terms "development," "cooperatives," or similar terms when used in this article, including the provisions on acquisition, disposal, and financing of cooperatives and

developments, shall be construed to apply only to the residential units.

(Added by Ord. 91-95)

Sec. 38-3.3 Purchase of leased fee interest.

The cooperative housing corporation which has applied to the department and which has qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest of the city, the entire leased fee interest appertaining to the cooperative subject to the terms, covenants, and conditions of the contract executed with the city; provided, that:

(a) If the cooperative housing corporation refuses to enter into such a contract, then it shall pay to the city all costs incurred by the city in the acquisition of the leased fee interest including, but not limited to, appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect these costs;

(b) In case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the cooperative.

(Added by Ord. 91-95)

Sec. 38-3.4 Qualification for lease or purchase.

(a) No sale of any leased fee interest in a cooperative housing development to a cooperative housing corporation shall be made

unless the cooperative housing corporation satisfies the following requirements:

(1) Submission of proof, in such form as is acceptable to the department, that a majority of the shareholders of the cooperative housing corporation have approved or ratified the purchase of the leased fee interest of the development;

(2) Submission of a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the cooperative housing corporation will be able to promptly pay the city for the leased fee interest;

(3) Submission of an application for purchase of the leased fee interest in good faith, and in such form as is acceptable to the department;

(4) Execution of a contract for the purchase of the leased fee interest in such form as is acceptable to the department; and

(5) Submission of proof, in such form as is acceptable to the department, that at least 60 percent of the cooperative housing corporation consists of owner-occupant-shareholders of residential units within the affected cooperative housing development.

(b) In the event of a wilful breach of contract by the cooperative housing corporation, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection

with any application. The determination by the department of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91 to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-3.5 Deposits by lessees.

(a) The department may require the submission of a deposit by the cooperative housing corporation applying to the department for the purchase of the leased fee interest pursuant to this chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for those deposits under this section.

(Added by Ord. 91-95)

Sec. 38-3.6 Preliminary negotiation required.

(a) Upon the filing of a petition by the cooperative housing corporation with the department, the

department shall request the lessor and the cooperative housing corporation to negotiate the just compensation which the cooperative housing corporation will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the cooperative housing corporation will be able to meet the financial requirements of Section 38-3.4(a)(2).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving a value of the lessor's interest in the land beneath the development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting the qualification amounts pursuant to Section 38-3.4(a)(2) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development, and were not prepared for use in the trial, shall not be discoverable, usable, or admissible by an opposing or adverse

party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-3.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the cooperative housing corporation, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 4. Condemnation of Residential Planned Development Leaseholds

Sections:

38-4.1 Applicability.
38-4.2 Designation of development for acquistion.
38-4.3 Purchase of leased fee interest.
38-4.4 Qualification for purchase.
38-4.5 Deposits by lessees.
38-4.6 Preliminary negotiation required.
38-4.7 Eminent domain trial.

Sec. 38-4.1 Applicability.

This article applies to residential planned developments which, at the time of acquisition of the development by the city, are:

(a) Developed into residential planned developments and occupied by residential lessees under apartment leases or planned

development conveyance documents executed before the effective date of this chapter; or

(b) Developed or partially developed into such planned developments occupied or to be occupied by residential lessees under apartment leases or planned development conveyance documents executed on or after the effective date of this chapter; provided, that 90 percent of such leases to the planned unit development have been executed.

(Added by Ord. 91-95)

Sec. 38-4.2 Designation of development for acquisition.

(a) Subject to subsection (b) of this section, the department may designate all or a portion of the land beneath a planned development containing residential units for acquisition, and facilitate the acquisition of the applicable leased fee interests in such land by the city through the exercise of the power of eminent domain or by purchase under the threat of eminent domain, after:

(1) At least 25 of all the owners within the development or at least owners of 50 percent of the residential units, whichever number is less, of all the owners within the planned development apply to the department to purchase the leased fee interest pursuant to Section 38-4.4, and file the application with the department; and

(2) Due notice and public hearing, the time and place of which have been duly

advertised in a newspaper of general circulation in the City and County of Honolulu, on at least three different days, the last publication being not less than five days before the date of hearing, the department finds that the acquisition of the leased fee interest in the development or a portion thereof, through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof as provided in this section will effectuate the public purposes of this chapter. For purposes of this subsection, "owners," as used in subsection (a)(1) of this section means the owner-occupants of the planned developments.

(b) The land designated and acquired by the city may consist of a portion of or the entire land area submitted to the declaration of planned development.

(Added by Ord. 91-95)

Sec. 38-4.3 Purchase of leased fee interest.

The planned development lessees, who have authorized approval and who have qualified for purchase of the leased fee interest, shall purchase from the city within 60 days of acquisition of the interest by the city, the leased fee interest appertaining to the planned development unit, together with an undivided leased fee interest equal to the percentage of common interest appurtenant to their units, subject to the terms, covenants, and conditions of the contract executed with the city; if any lessees refuse to enter

into such contract, then in that event, those lessees shall pay to the city all costs incurred by the city in the acquisition of the relevant planned development within the development including but not limited to appraisal costs, costs of publication, and survey, and the department is authorized to take whatever action it deems necessary to collect the costs; and provided, further, that in case of a wilful breach of the purchase agreement, the city shall be entitled to any available remedy, including the sale of its interest in the planned development. (Added by Ord. 91-95)

Sec. 38-4.4 Qualification for purchase.

(a) No sale of any leased fee interest in land under a residential planned development land shall be made unless the lessees:

(1) Are at least 18 years of age and are owner-occupants of their residential planned units;

(2) Are bona fide residents of the City and County of Honolulu;

(3) Have legal title to, or pursuant to an agreement of sale an equitable interest in a planned unit development situated on the leased property applied for; provided, that for purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase that property. An "agreement of sale" means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Do not own property in fee simple lands suitable for residential purposes within the City and County of Honolulu or have pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. A person is deemed to own lands pursuant to this chapter, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest in a land trust in the City and County of Honolulu;

(5) Submit a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that the lessees who are participating in the purchase of the fee interest will be able to pay the city promptly for the leased fee interests;

(6) Submit an application for the purchase of the leased fee interest in good faith, and in such form as is acceptable to the department; and

(7) Execute a contract for the purchase of the fee interest in such form as is acceptable to the department.

(b) In the event of a wilful breach of contract by the lessees of the residential planned development, the city may sell or assign its interest without respect to the requirements of this section.

(c) The department may require additional testimony or evidence under oath in connection with any application. The determination by the department of any applicant's eligibility under this section shall be conclusive to all persons thereafter dealing with the property; provided, that the making of any false statement knowingly by applicants or other persons in connection with any application shall constitute perjury and be punishable as such.

(d) The department shall adopt rules under HRS Chapter 91, to effectuate the purposes of this section.

(Added by Ord. 91-95)

Sec. 38-4.5 Deposits by lessees.

(a) The department may require the submission of a deposit by lessees seeking to purchase the leased fee interest in their planned development housing unit pursuant to this chapter. The amount of the deposit shall be established by rule.

(b) The deposit may be applied by the department to payment of appraisal, survey, attorney fees, administrative costs, and any other costs the department has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. The department shall incur no liability for the deposits under this section.

(Added by Ord. 91-95)

Sec. 38-4.6 Preliminary negotiation required.

(a) Upon the filing of a petition by the lessees with the department, the department shall request the lessor and the lessees to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development. If no agreement is reached within 60 days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the department and the department may use the information in determining, prior to commencing condemnation proceedings, the probability that the lessees will be able to meet the financial requirements of Section 38-4.4(a)(5).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of the action in condemnation or eminent domain.

Any offers, appraisals, other documents, or any other expert opinions giving the value of the lessor's interest in the land beneath the planned development, which were prepared by a party for use in preliminary negotiations as provided for in this section, for setting qualifications amounts pursuant to Section 38-4.4(a)(5) or for negotiations to determine the just compensation after designation to acquire the lessor's interest in the development and were not prepared for use in the trial, shall not be discoverable,

usable, or admissible by an opposing or adverse party in any action, suit, or proceeding brought under this chapter.

(Added by Ord. 91-95)

Sec. 38-4.7 Eminent domain trial.

The parties to the eminent domain action brought under this chapter shall be the city as plaintiff and the lessees, lessors, landowners and all other necessary parties as defendants. All parties shall be given an opportunity to present evidence of the fair market value of the leased fee interest being acquired. (Added by Ord. 91-95)

Article 5. Eminent Domain

Sections:

38-5.1 Applicability.
38-5.2 Exercise of power of eminent domain.
38-5.3 Compensation.
38-5.4 Interest acquired.
38-5.5 Interest in compensation paid by the city.
38-5.6 Compulsory or involuntary conversion.

Sec. 38-5.1 Applicability.

This article applies to developments which are created by condominium property regimes under HRS Chapter 514A, and to developments existing under cooperative housing corporation status, and to

residential planned developments not covered by HRS Chapter 516. (Added by Ord. 91-95)

Sec. 38-5.2 Exercise of power of eminent domain.

Within 12 months after the designation of the development or portion thereof for acquisition, the department shall facilitate the acquisition of the leased fee interest in the land beneath the development of the City and County of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire the leased fee interest or portion thereof so designated. If the leased fee interest is not acquired or eminent domain proceedings are not instituted within the 12 month period, the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation. (Added by Ord. 91-95)

Sec. 38-5.3 Compensation.

The compensation to be paid for the leased fee interest shall be the current fair market value of the leased fee interest. The compensation shall be determined as of the date of the summons of the complaint in eminent domain. (Added by Ord. 91-95)

Sec. 38-5.4 Interest acquired.

(a) Upon acquisition of a development or portion thereof as provided in this article, the property interest acquired by the city is all of the right, title, and interest of the fee owner, and of the

lessor and fee owner and all legal and equitable owners, if any besides the lessor, in and to the development or portion thereof acquired, subject to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential condominium or cooperative housing corporation leases, which are not inconsistent with the intent of this article. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether such interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the apartment lease, condominium conveyance document, or proprietary lease is subject to any leasehold mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee in no manner shall affect or impair such mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to the extent necessary to avoid any impairment of the leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance in writing consents to the transfer thereof to the

fee and merger as provided in this chapter. Upon written consent by the holder thereof, each leasehold mortgage, lien, or encumbrance to which the apartment lease, condominium conveyance document or proprietary lease is subject and to which the consent refers shall be transferred to and shall bind the fee acquired by the lessee, and thereafter shall continue in full force and effect as a mortgage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest.

(Added by Ord. 91-95)

Sec. 38-5.5 Interest in compensation paid by the city.

The lessor, the fee owner, and all legal and equitable owners shall share in the compensation paid by the city as their respective interest shall appear. Notwithstanding any provision to the contrary in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in the compensation paid by the city to the extent of the persons's interest as may be determined by agreement of those entitled to share in the compensation paid by the city and in the absence of such agreement pursuant to HRS Chapter 658. (Added by Ord. 91-95)

Sec. 38-5.6 Compulsory or involuntary conversion.

It is the intent of the council, within the meaning of Section 1033 or Section 1231 of the Internal Revenue Code or the applicable provisions of HRS Chapter 235, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the city under this section shall constitute a compulsory or involuntary conversion, as a result of the exercise of the power of condemnation or the threat of imminence thereof, and that the fee owner shall not, by reason in whole or in part of any provision of this chapter or by reason of the execution by the fee owner of leases to the property and other properties subsequent to the date of approval of this chapter, be deemed to hold the property primarily for sale to customers in the ordinary course of trade or business. (Added by Ord. 91-95)

Article 6. Revolving Fund

Section:

38-6.1 Fee simple condominium and cooperative and planned unit development revolving fund.

Sec. 38-6.1 Fee simple condominium and cooperative and planned unit development revolving fund.

A fee simple condominium and cooperative and planned unit development revolving fund is created.

The funds appropriated for the purposes of this chapter and all moneys received or collected by the department of housing and community development under this chapter shall be deposited in the revolving fund. The proceeds in the fund shall be used for the necessary expenses of the department, including administration, under this chapter. All interest earned on moneys deposited by lessees into this revolving fund shall accrue to the lessees. (Added by Ord. 91-95)

APPENDIX G

CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

ORDINANCE 05-001

BILL 53 (2004), CD1, FD1

A BILL FOR AN ORDINANCE

RELATING TO LEASEHOLD CONVERSION.

BE IT ORDAINED by the People of the City and County of Honolulu:

SECTION 1. Findings and Purpose.

The council finds that:

Since the enactment of Chapter 38, Revised Ordinances of Honolulu 1990 ("Chapter 38), the issue of mandatory leasehold conversion has been a highly contentious issue that has divided the community.

The council understands that the use of eminent domain should not be taken lightly and must be justified by a valid public purpose. Section 3-110 of the Revised Charter of the City and County of Honolulu ("Charter") states: "The council shall by resolution determine and declare the necessity of taking property

for public purposes, describing the property and stating the uses to which it shall be devoted." Article I, Section 20 of the Hawaii Constitution also states that private property shall not be taken for public use without just compensation. Thus, the exercise of eminent domain must be supported by (1) a valid public purpose and (2) just compensation. Under Hawaii law, the council has the discretion whether or not to exercise the power of eminent domain. The city has always taken the position that the council has the ultimate power to condemn.

The public purposes of Chapter 38 were set forth in detail in Ordinance 91-95. According to Ordinance 91-95, the purpose of Chapter 38 was to provide affordable housing and to strengthen the economy through fee ownership. Ordinance 91-95 lists "runaway land prices," "shortage of fee simple residential condominiums," "artificial inflation of land values," "lessees forced to accept long-term leases . . . which contain terms and conditions which are financially disadvantageous to them," "land values, artificially inflated by concentrated or single ownership," and "potential for economic instability and disruption on Oahu" as public purposes furthered by Chapter 38.

The council finds that mandatoty conversion of multi-family residential leaseholds under Chapter 38 is no longer needed to assuage the social and economic problems mentioned in Ordinance 91-95 and, therefore, no longer advances a public purpose for which the city should exercise its extraordinary powers of condemnation. The social and economic problems listed as the public purposes furthered by Chapter 38

do not exist today to the same extent as they may have existed in 1991.

The council further finds that a lessee purchasing a residential leasehold unit knew or should have known about the negative aspects of the lease prior to the purchase. Since 1990, such a lessee should have received a copy of the underlying lease. Since 1991, the lessee should have received a simplified disclosure of the salient terms of the lease agreement, including but not limited to, the remaining term of the lease, the rent renegotiation dates, the potential for significant increases in renegotiated rents, and the surrender clause.

In addition, it is a fundamental principle that the power to enact necessarily implies the power to repeal and one legislature cannot be limited or bound by the actions of a previous one. Thus, the council has the right to make an independent decision whether to repeal the law entirely.

Finally, "there is no vested right in a public law which is not in the nature of a private grant, and however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it. . . . No person has a vested interest in any law or legislative policy which entitles him to have it remain unaltered for his benefit." *In re Application of Herrick,* 93 Hawai'i 329, 338 (1996).

Based on the foregoing findings, the council believes and concludes that Chapter 38 no longer serves a public purpose and should be repealed.

Thus, the purpose of this ordinance is to repeal Chapter 38, Revised Ordinances of Honolulu 1990, concerning leasehold conversion.

SECTION 2. Chapter 38 ("Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion"), Revised Ordinances of Honolulu 1990, is repealed.

SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. "Development" means the same as defined under Section 38-1.2, ROH, on the day before the effective date of this ordinance. "Valid designation" means a designation of specific units in a development for leasehold conversion and subsequent approval for condemnation by the council that complied with Chapter 38, ROH, as existing on the day before the effective date of this ordinance and construed by the Hawaii Supreme Court in *Coon v. City and County of Honolulu*, 98 Haw. 233, 47 P.3d 348 (2002).

(b) Any designation of a development for leasehold conversion shall be invalid on the effective date of this ordinance if the council did not authorize before the effective date of this ordinance the eminent domain proceeding to acquire all or a portion of the leased fee interests to the development.

SECTION 4. This ordinance shall not affect any reimbursement for actual out-of- pocket expenses that may be owed a fee owner, lessor, or legal and equitable owner of a designated development pursuant to Section 38-5.2, ROH, for the failure by the city, within 12 months of the designation, to acquire the applicable leased fee interests to the development or institute eminent domain proceedings to acquire such interests. Any entitlement to reimbursement shall be subject to Chapter 38, ROH, including Section 38-5.2, ROH, as existing on the day before the effective date of this ordinance. This section shall apply whether the expiration of the 12-month period occurs prior to, on, or after the effective date of this ordinance. This section shall also apply to any development, the designation for which is invalidated as a result of Section 3(b) of this ordinance before the expiration of the 12-month period of Section 38-5.2, ROH.

SECTION 5. This ordinance shall take effect upon its approval.

INTRODUCED BY:

Mike Gabbard

Councilmembers

DATE OF INTRODUCTION:

August 2, 2004
Honolulu, Hawaii

APPROVED AS TO FORM AND LEGALITY:

/s/
Deputy Corporation Counsel

APPROVED this 9th day of February, 2005.

/s/
MUFI HANNEMANN, Mayor
City and County of Honolulu

[Certificate Omitted in this Appendix]

APPENDIX H

LEASED FEE INTEREST PURCHASE CONTRACT

DEPOSIT

The City and County of Honolulu acknowledges the receipt of the sum of $1,000.00 paid to it by the Buyer, or on behalf of the Buyer, named below.

OFFER AND ACCEPTANCE:

1. City: The City and County of Honolulu, a municipal corporation of the State of Hawaii ("City") is the entity authorized to convey the leased fee interest in the Real Property on which the condominium project described below is situated to the buyer. The principal place of business and mailing address of the City is Honolulu Hale, 530 South King Street, Honolulu, Hawaii 96813.

2. BUYER: The Buyer is RALPH JAMES MITCHELL and LUCY ELIZABETH MITCHELL, husband and wife, ("Buyer"), whose residence and mailing address is 1778 ALA MOANA BOULEVARD, APARTMENT 804, HONOLULU, HAWAII 96815.

3. UNIT: The subject of this agreement is the leased fee interest appurtenant to unit number 804, the residential apartment subject to a Declaration of Condominium Property Regime as defined in Hawaii Revised Statutes Chapter 514A ("Unit") in the

condominium project known as DISCOVERY BAY ("Project").

4. AGREEMENT TO CONVEY AND ACCEPT CONVEYANCE: The Buyer agrees to accept from the City, and the City agrees to convey to the Buyer, the Property on the terms stated in this Leased Fee Interest Purchase Contract ("Agreement").

5. INTEREST TO BE ACQUIRED: The City shall convey to the Buyer by Quitclaim Deed (a) all of its right, title and interest in (i) the Unit and all limited common elements appurtenant to the Unit, and (ii) the undivided percentage interest in the real property and other common elements upon which the Unit is situated and b) all of its right, title and interest in Buyer's Condominium Conveyance Document ("Condominium Conveyance Document") of the Unit and the real property ("Property"). The Buyer shall not be in default of any of the terms stated in the Condominium Conveyance Document for the Property on the Closing Date.

6. PURCHASE PRICE: The purchase price for the Property, together with any blight of summons or other damages awarded to the owner of the fee simple interest in the real property, will be determined by the Court before which is conducted the trial of the condemnation action initiated by the City by the exercise of its power of eminent domain or it will be the amount agreed to by the Buyer and the owner of the fee simple interest in the real property ("Purchase Price"). The Buyer shall execute an amendment or amendments to this Agreement, when requested to do so by the City, to state the Purchase Price when it is

determined pursuant to the provisions in this paragraph.

7. PAYMENT OF PURCHASE PRICE: The Buyer shalt pay the Purchase Price to the City in full in cash. A portion of the Purchase Price may be obtained from a lender. The Buver's lender (if known) is:
American Savings Bank

8. TITLE AND TENANCY: The Title to the Property will vest in the Buyer in the same manner as the lease of the Property is held by the Buyer as stated in the Buyer's Condominium Conveyance Document unless a change in that tenancy is requested by the Buyer as indicated by the Buyer's checking the appropriate box below:

[ ] Severalty [ ] Tenants by the Entirety
[ ]Joint Tenants [ ] Tenants in Common
[ ]Other: _____

9. CLOSING: The closing date ("Closing Date") will be determined by the Buyer and the City, but in no event shall the Closing Date be later than 60 days after the City acquires the Property.

10. ESCROW: The escrow company for this transaction will be determined by the Buyer and the City prior to the Closing Date. The Escrow which shall act in accordance with Escrow Instructions executed by the Buyer and the City.

11. PRORATIONS: Lease rent will be prorated as of the date that the document conveying title to the Property to the City is recorded in the Bureau of

Conveyances, State of Hawaii and/or with the Assistant Registrar of the Land Court of the State of Hawaii.

12. ADDITIONAL TERMS: Exhibit A states additional terms of this Agreement which exhibit is attached to this Agreement and made a part of it.

THE BUYER AND THE CITY executed this Agreement on the date stated beside their signatures, below.

June 4th, 2004 /s/
RALPH JAMES MITCHELL

June 4th, 2004 /s/
LUCY ELIZABETH MITCHELL

CITY AND COUNTY OF HONOLULU

6-08, 2004 By: /s/
Its: Director of the Department of Community Services

THIS IS A LEGALLY BINDING CONTRACT, READ IT CAREFULLY

Approved as to form and legality by the
Department of the Corporation Counsel,
City and County of Honolulu
dcl:7/24/98:leased fee interest purchase contract

EXHIBIT A

ADDITIONAL TERMS

1. QUITCCLAIM DEED: Title will be conveyed by Quitclaim Deed from the City to the Buyer. The Quitclaim Deed will be prepared by the City.

2. EXECUTION OF INSTRUMENTS: The Buyer agrees to execute all instruments necessary to close this transaction requested by the City or the Escrow.

3. BUYER'S INSPECTION AND SATISFACTION: The Buyer represents to the City that, as of the Closing Date, the Buyer will know, will have examined, and will have investigated, to the full and complete satisfaction of the Buyer, the physical nature and condition of the Property, or the Buyer, by the Closing Date will be deemed to have waived such knowledge, examination, and investigation.

The Buyer further acknowledges that neither the City nor any agent, attorney, appointee, employee or representative of the City has made any representation whatsoever regarding the Property or any part thereof, not stated in this Agreement, including without limiting the generality of the foregoing, any representations as to: (i) the condition of the Property; (ii) the value of the Property; (iii) the suitability of the Property for the Buyer's intended use or for any use whatsoever; (iv) any applicable building, fire, or zoning laws, codes, or regulations, or compliance with them; (v) the existence of or compliance with any required permits, certificates, or licenses issued by any governmental agency; (vi) any

warranty as to the structural, mechanical, plumbing, electrical, or air conditioning systems of the Property; (vii) the existence or absence of any hazardous materials; or (viii) the accuracy or validity of any documents furnished to the Buyer.

The Buyer agrees that the Buyer has relied and will be relying solely on the Buyer's own inspection, examination, and investigation, and will review all aspects of the Property pertaining to the matters stated above in this paragraph. The Buyer assumes the risk that adverse physical conditions may not have been revealed by its own investigations and examinations. The Buyer further assumes the risk of all changes in zoning, land use, ordinances, rules, regulations and adverse governmental actions of any kind that might affect the Property or the Buyer's intended use of the Property.

The Buyer agrees to Purchase the Property on the Closing Date in "AS IS, WHERE IS" condition, and "WITH ALL FAULTS". The Buyer's agreements and representations above in this paragraph shall survive the Closing Date.

4. BUYER'S UNDERSTANDING: By executing this Agreement, the Buyer understands and agrees:

A. This Agreement is expressly conditioned upon the City's successful acquisition of the Property through the exercise of the power of eminent domain, and that failure of the City to acquire the Property, through no fault of the Buyer, will render this contract null and void without further action by either the Buyer or the City; and

B. The City has relied on, and will continue to rely on, all information, representations, statements and agreements made by Buyer in the Application to Purchase Lease Fee Interest and all attachments and updates thereto submitted to the City, ("Application") which Application is incorporated into this Agreement by reference and made a part of it.

5. ORDINANCE AND RULES: All of the terms and conditions of Chapter 38, Revised Ordinances of Honolulu ("Ordinance") and the Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion, as amended ("Rules") promulgated by the City Department of Housing and Community Development and amended by the City Department of Community Services which currently administers the implementation of Chapter 38 ROH are incorporated by reference into this Agreement and made a part of it. The Ordinance and the Rules are binding on the Buyer and the City. In the event of any conflict between any provisions stated in the Ordinance and the Rules and this Agreement, the provisions contained in the Ordinance and the Rules shall control without invalidating or altering the remaining provisions of this Agreement.

6. BUYER'S INDEMNIFICATION; GENERAL: The Buyer agrees to indemnify, defend, and hold the City harmless against and from:

A. Any and all liabilities, obligations, and claims against the City, its employees, appointees, attorneys, agents, successors, and assigns which pertain to the Property, resulting from the acts of the City, its elected officials, administrative staff, appointees, employees,

attorneys, agents, consultants, successors, and assigns both prior and subsequent to the consummation of this transaction on the Closing Date, provided that such acts are authorized acts in connection with the acquisition of the leased fee interest appurtenant to the Unit pursuant to Chapter 38, Revised Ordinances of Honolulu 1990;

B. Any and all actions, suits, proceedings, demands and judgements, including all costs, expenses, and reasonable attorneys' fees incurred with respect to any of the foregoing.

The Buyer's agreements and representations above in this paragraph 6, shall survive the Closing Date.

7. BUYER'S INDEMNIFICATION: HAZARDOUS MATERIALS: The Buyer agrees to indemnify, defend, and hold the City, its successors and/or assigns harmless for any liability, costs damages, or other losses relating to or arising out of the Property's contamination with hazardous materials and for any liability for the removal of contaminants or remedial action which is necessary due to the contamination of soil, surface water or ground water at or underlying the Property.

A. The term "contamination" means toxic or hazardous materials which have been deposited, stored, or placed at the Property, or have otherwise come to be located on, in or under the soil, air, surface water, or ground water at the Property.

B. The term "removal of contaminants" or "remedial action" means the removal, treatment, or

disposal and/or other appropriate disposition of contaminated soils, surface water, or ground water at the Buyer's sole cost and expense.

C. The terms: (a) "contaminant", and (b) "toxic or hazardous material" means any substance that is at any time defined or listed in, or otherwise classified pursuant to any applicable laws or regulations (including without limitation, environmental laws), as a hazardous substance, hazardous waste, infectious waste, toxic substance, toxic pollutant, or regulated substance.

D. This indemnity shall apply to all removal or remedial actions as may be required by a governmental agency with jurisdiction over the matter.

The Buyer's agreements and representations above in this paragraph 7, shall survive the Closing Date.

8. PAYMENT OF COSTS: The Buyer shall pay all costs connected with the purchase of the Property inchding, but not limited to, title insurance, escrow fees, document preparation fees, recording fees, conveyance tax, notary fees, property manager transfer fees, if any, a prorata share of all attorneys' fees and costs, court costs, allocated costs as defined in the Ordinance and the Rules, appraisers' fees, blight of summons damages, if any, and all other fees and costs whatsoever. The deposit made by or on behalf of the Buyer referred to above will be used by the City to pay a prorata share of expenses incurred by the City pursuant to the Ordinance and the Rules and any excess will be delivered to the Escrow by the City to be credited by the Escrow toward the Purchase Price.

9. TIME OF THE ESSENCE; REMEDIES: Time is of the essence in this transaction. Upon the occurrence of any of the following events, this Agreement may be terminated by the City, in its sole and absolute discretion, by written notice of the termination to the Buyer, and all payments made by the Buyer, except funds delivered to the Escrow by the Buyer's lender which will be returned to that lender, will be returned to the Buyer reduced by the expenses incurred including, but not limited to, a proportionate share of all allocated costs as defined in the Ordinance and the Rules, escrow fees, and title cancellation fees. Termination of this Agreement by the City will be without prejudice to any legal claims and remedies available to it against the Buyer.

A. The failure of the Buyer to submit any required documentation to the City satisfactory to the City within the applicable period of time pursuant to the Ordinance or the Rules;

B. The failure of the Buyer to deliver the Purchase Price to the Escrow as stated in this Agreement;

C. The failure of the Buyer to meet any other obligation which the Buyer is required to meet as stated in this Agreement;

D. The successful negotiation by the Buyer with the lessor/fee owner for the purchase of the Property prior to the filing of a condemnation action by the City.

10. RECOVERY OF COSTS: The prevailing party shall be entitled to recover all costs incurred from any

action or proceeding initiated pursuant to this Agreement, including reasonable attorneys' fees.

11. PRELIMINARY REPORT; REMEDIES: Prior to the Closing Date, the City shall furnish the Buyer with a Preliminary Title Report for the interest which is to be conveyed to the Buyer. If the City fails to deliver the Preliminary Title Report, the Buyer, at its option, may terminate this Agreement without prejudice to any legal claims and remedies arising in favor of either party on account of failure of the other party to perform as required by this Agreement. Termination of this Agreement by the Buyer will be without prejudice to any legal claims and remedies available to it against the City.

12. MISCELLANEOUS PROVISIONS:

A. Amendment. The provisions of this instrument may be amended only by each party executing a subsequent written instrument which states each amended provision.

B. Assignment. Neither the entire agreement which is stated in this instrument nor any interest in it may be assigned by any party for any purpose without the prior written consent of each party.

C. Applicable Law. The provisions of this instrument shall be interpreted in accordance with the law of the State of Hawaii as that law is construed and amended from time to time.

D. Authorization. Each party warrants to each other party that the individuals executing this instrument are authorized to do so.

E. Binding Effect. Upon its execution by each party, this instrument shall become binding and enforceable according to its provisions. If more than one party is obligated to perform an act by any provisions stated in this instrument, those parties shall be jointly and severally liable and obligated for the performance of those acts. The rights and obligations of each party named in this instrument shall bind and inure to the benefit of each party, respectively, and the respective heirs, personal representatives, successors, and assigns of each party.

F. Consent, Subsequent Agreement. If a subsequent consent required of any party by the provisions of this instrument is requested by a party, it shall not be unreasonably withheld by the party to whom the request is made.

G. Construction. Each party named in this instrument acknowledges and agrees that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the negotiation and preparation of this instrument; (iii) each party has consulted with their respective legal counsel and other professional advisors as each party has deemed appropriate; (iv) each party and the party's legal counsel and advisors have reviewed this instrument; and (v) each party has agreed to be bound by the terms stated in this instrument following its review and obtaining advice.

H. Counterparts. This instrument may be executed by the parties in counterparts. The counterparts executed by the parties named in this instrument and properly acknowledged, if necessary, taken together, shall constitute a single instrument.

I. Dates. If any dates stated in this instrument fall on a Saturday, Sunday, or legal holiday, such date shall be the next following business day.

J. Defined Terms. Certain terms where they initially are used in this instrument are set off by quotation marks enclosed in parentheses and are subsequently capitalized. Those designated terms shall have the same meaning throughout this instrument, unless otherwise specifically stated or clearly inappropriate in the context.

K. Force Majeure. If any party is prevented from performing its obligations stated in this instrument by any event not within the reasonable control of that party, including, but not limited to an act of God, public enemy, or war, fire, an act or failure to act of a government entity (except on the part of the City), unavailability of materials, or actions by or against labor unions, it shall not be in default in the performance of its obligations stated in this instrument. PROVIDED, HOWEVER, any party delayed by such an event shall request an extension of time to perform it obligations stated in this instrument by notifying the party to which it is obligated within ten days following the event. If the notified party agrees that the event was the cause of the delay, the time to perform the obligations stated in this instrument shall be extended by the number of days of

delay caused by the event. If the required notice is not given by the delayed party, no time extension shall be granted.

L. Gender; Number. In this instrument, the use of any gender shall include all genders and the use of any number in reference to nouns and pronouns shall include the singular or plural, as the context dictates.

M. Integration. This instrument contains all of the provisions of the agreement between the parties pertaining to the subject matter stated in this instrument. Each party acknowledges that no person or entity made any oral or written representation on which a party has relied as a basis to enter into the agreement stated in this instrument which is not included as a provision in it.

N. Memorandum. If required by the provisions of this instrument or requested by any party, a memorandum of this instrument shall be executed by the parties, the signatures properly acknowledged by a Notary Public, and recorded in the Bureau of Conveyances, State of Hawaii.

O. No Drafter. No party shall be deemed to have drafted this instrument. No provision stated in this instrument shall be construed against any party as its drafter.

P. No Offer. The provisions stated in this instrument shall not bind any party until each party has executed it. The mere delivery of this instrument is not an offer.

Q. No Obligations to Third Parties. Unless there is a provision stated in this instrument to the contrary, the execution and deliveryof this instrument shall not confer rights on any person or entity except the parties, or obligate any party to any person or entity except another party.

R. Notice. Any notice required or permitted by the provisions of this instrument to be given by a party to any other party shall be written and either shall be delivered personally or mailed postage prepaid by certified mail, return receipt requested, to each other party at the address and to the person designated by each party, stated below. No other method of notice shall be effective.

(1) CITY AND COUNTY OF HONOLULU:
DEPARTMENT OF COMMUNITY SERVICES
848 SOUTH BERETANIA STREET
SUITE 306
HONOLULU, HAWAII 96813

(2) RALPH J. MITCHELL
LUCY E. MITCHELL
1778 ALA MOANA BOULEVARD
APARTMENT 804
HONOLULU, HAWAII 96815

S. Paragraph Titles. The titles of provisions stated in this instrument are included only for the convenience of the parties. They shall not be considered in the construction of the provisions stated in this instrument.

T. Required Action by the Parties. Each party named in this instrument agrees to execute the instruments and to diligently undertake the acts necessary to consummate the transaction contemplated by this Agreement. Each party shall use its best efforts to consummate the transaction contemplated by this instrument.

U. Severability. If any provision stated in this instrument subsequently is determined to be invalid, illegal, or unenforceable, that determination shall not affect the validity, legality, or enforceability of the remaining provisions stated in this instrument unless the effect is made impossible by the absence of the omitted provision.

V. Survival. Any representation and warranty stated in this instrument made by a party shall survive the termination of the agreement stated in this instrument, unless otherwise specifically stated.

W. Required Actions of Buyer and City. Buyer and City agrees to execute such instruments and documents and to use their best efforts to perform the actions required in order to consummate the transaction contemplated by this instrument

X. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto (as permitted pursuant to the provisions of this Agreement).

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(2)

No. 07-1305

FILED
MAY 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CITY AND COUNTY OF HONOLULU,
a municipal corporation of the State of Hawai'i,

Petitioner,

vs.

SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's Opinion concluded that the District Court failed to follow this Court's decision in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit refused to apply the reserved powers doctrine to Respondents' contracts with Petitioner.

LIST OF PARTIES

The Petitioner is the City and County of Honolulu ("Petitioner").

The Respondents are SALLY A. MATSUDA, Trustee of the Sally A. Matsuda Self-Trusteed Trust dated October 15, 1993; RALPH JAMES MITCHELL; LUCY ELIZABETH MITCHELL; NOOSHA BIRGITTA FESHARAKI; EARL LEWIS KIDDER; JEENIE MARIE KIDDER; JAMES THOMAS RAPISARDA; JONATHAN VON BRANA; THOMAS LEONARD PRESTON; LOREN HERBERT HOHMAN, II; HERBERT CAPLAN, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; ELENA VIRGINIA PECILE, Co-Trustee of the Herbert Caplan and Elena V. Pecile Trust dated March 27, 2003; WILMA I. PARKER, Trustee of the Wilma I. Parker Trust dated March 16, 1989, as amended; TROY FONTAINE WILLIAMS; LARRY WEISNER; DELORES WEISNER; RICHARD JOSEPH JAEGER, III; MARIANNE MARION JAEGER; RICHARD ERLAND JOHNSON; WILLIAM GARRETT FUSON, JR.; KANG YUK LEE; SUK JA LEE; CLAUDE R. ROTHE, Trustee of the Claude R. Rothe Living Trust dated March 26, 1998; ALVIN R. OLSON, Trustee under Alvin R. Olson Revocable Trust Agreement dated July 20, 1998; NATALIA INDRASARI; WARREN M. SWEET, Trustee of the Sweet Joint Revocable Trust dated June 21, 1991; RHEBA ALICE SWEET, Trustee of the Sweet Joint Revocable Trust

LIST OF PARTIES – Continued

dated June 21, 1991; ROBERT JOSEPH MEHRING; AYUMI WATANABE MEHRING; ARNOLD THEODORE FLEMMINGS, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; MARIANA FLEMMINGS, Co-Trustee of the Arnold Theodore Flemmings and Mariana Flemmings Revocable Living Trust dated December 6, 1999; MELVIN TAKEO MATSUOKA; DELWIN BYRON SCHNEIDER, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; KATHERINE LOUISE SCHNEIDER, Trustee under the Delwin Byron Schneider and Katherine Louise Schneider Family Trust dated October 14, 1996; RONALD DEAN SILVERMAN; FARHAD F. SIMYAR; SOUSSAN SIMYAR; and FRANK WINSTON KERN ("Respondents").

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at 512 F.3d 1148, and is set forth in Petitioner's Appendix ("Pet. App.") at pp. 1a-19a. The Opinion of the United States District Court for the District of Hawaii ("District Court"), which was reviewed by the Ninth Circuit, is reported at 378 F. Supp. 2d 1249, and is set forth in Pet. App., at pp. 35a-52a.

JURISDICTION

The Ninth Circuit's *Opinion* and *Judgment* were entered on January 14, 2008 ("Ninth Circuit's Opinion"). *See* Pet. App., at pp. 2a, 21a. The *Petition for a Writ of Certiorari* was filed on April 14, 2008 ("Petition"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution's Contract Clause provides that "[n]o State shall . . . pass any . . . Law

impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.[1]

ORDINANCES INVOLVED

This case involves the following City and County of Honolulu ordinances: (1) Ordinance 91-95, which was enacted in 1991 and later codified at Chapter 38 of the Revised Ordinances of Honolulu ("Chapter 38"); and (2) Ordinance 05-001, effective as of February 9, 2005, and repealing Chapter 38.[2] The original version of Ordinance 91-95 is set forth in Pet. App., at pp. 53a-93a. Chapter 38 is set forth in Pet. App., at pp. 94a-129a. Ordinance 05-001 is set forth in Pet. App., at pp. 130a-135a.

INTRODUCTION

Petitioner has presented no "compelling reasons" for its Petition to be granted. *See* Supreme Court Rule ("Sup. Ct. R.") 10. Specifically, Petitioner fails to

[1] In addition to their Contract Clause claim, Respondents sought relief for Petitioner's violations of the United States Constitution's Fourteenth Amendment's Due Process Clause (substantive component), U.S. CONST. amend. XIV, § 1, and Bills of Attainder Clause, U.S. CONST. art I., § 10. Those issues were not addressed by the District Court or the Ninth Circuit.

[2] Respondents also sought relief under 42 U.S.C. § 1983, but that issue was not addressed by the District Court or the Ninth Circuit.

demonstrate that the Ninth Circuit's Opinion is in conflict with a decision of this Court or another Court of Appeals, or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioner has not even carried its significantly less strenuous burden of showing that the District Court correctly applied the relevant substantive law when it granted Petitioner summary judgment – which would, in any event, constitute insufficient grounds to grant the Petition. *See id.*

This action arises out of Petitioner's enactment and enforcement of Ordinance 05-001, which repealed the statutory mechanism allowing owners of leasehold interests in condominium units such as Respondents to convert their leasehold interests into fee interests by using Petitioner's eminent domain power.[3] *See* Chapter 38, set forth in Pet. App., at pp. 94a-129a.[4] Respondents each hold legal title to their respective residential condominium apartments in

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[3] The Hawaii legislature has delegated the power of eminent domain to local bodies such as Petitioner. Hawaii Revised Statutes ("Haw. Rev. Stat.") § 46-1.5(6) (1993).

[4] The history, purpose and constitutionality of Chapter 38 were thoroughly examined (and upheld) by the Ninth Circuit in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995), *cert. denied*, *City and County of Honolulu v. Small Landowners of Oahu*, 525 U.S. 871 (1998), *Small Landowners of Oahu v. City and County of Honolulu*, 525 U.S. 921 (1998), *Hawaii Leaseholders Equity Coalition v. Small Landowners of Oahu*, 525 U.S. 1018 (1998).

the complex known as "Discovery Bay." Pursuant to Chapter 38, each of the Respondents entered into a written Leased Fee Interest Purchase Contract (collectively, the "Contracts") with Petitioner, which agreed to convey to each Respondent his or her respective leased fee interest in Discovery Bay.[5]

Despite the fact that (1) Respondents fulfilled every condition and requirement imposed by Chapter 38; (2) Petitioner determined the acquisition of the leased fee interests at Discovery Bay effectuated the public purpose of Chapter 38; and (3) the parties entered into "legally binding contract[s]" as described by Petitioner, Petitioner nevertheless passed Ordinance 05-001 repealing Chapter 38 and purposefully excluded Respondents from a savings clause that would have allowed them to complete their purchase. By this new law, Petitioner then repudiated the Contracts. If this kind of unconscionable governmental action does not constitute a violation of the Contract Clause, it is difficult to imagine what does. By repealing Chapter 38 in such a way as to extinguish Respondents' contractual rights, Petitioner substantially impaired Respondents' Contracts in violation of the United States Constitution.

The Ninth Circuit held that the heightened scrutiny test established by this Court in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1

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[5] The individual Contracts between Petitioner and each Respondent are in the same format as that set forth in Pet. App., at pp. 136a-151a.

(1977) provides the "mandatory analysis" for Respondents' Contract Clause claims. Pet. App., at p. 14a. It vacated the District Court's grant of summary judgment in Petitioner's favor and remanded to allow the District Court to consider Respondents' Contract Clause claims "under the framework set forth in *U.S. Trust*." Pet. App., at p. 16a. The Ninth Circuit's Opinion is consistent with this Court's and the Court of Appeals' decisions on the Contract Clause, indeed, the pertinent standard of review was settled by this Court over thirty years ago.

The Petition is striking in two important respects. First, Petitioner erroneously claims that *U.S. Trust's* heightened scrutiny test governing the impairment of public contracts does not apply to Respondents' Contract Clause claims. This test, first articulated by this Court in *U.S. Trust*, has since been applied in a long line of cases involving the impairment of public contracts. Under this test, when legislative action impairs the government's own contracts, the government must demonstrate that the impairment is both reasonable and necessary to serve an important public purpose. But rather than hold itself to the requisite constitutional standard, Petitioner brushes aside this Contract Clause analysis with the unsupported assertion that the common law "reserved powers" doctrine trumps this established constitutional test. Indeed, Petitioner's central argument is that the Ninth Circuit failed to substitute and apply the reserved powers doctrine to absolve

Petitioner from its contractual obligations and to eviscerate Respondents' constitutional rights.

Taken to their logical extreme, Petitioner's arguments would give it unfettered discretion to repudiate its own contracts under the guise of its police and eminent domain powers. This grant of judicial immunity directly conflicts with this Court's ruling in *U.S. Trust* and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). In a public contract case such as this, even when the exercise of the police or eminent domain power is at issue, the heightened scrutiny test must be applied. The second prong of the test – the requirement of a legitimate and important public purpose – guarantees that the State is exercising its police or eminent domain power, rather than benefitting special interests.

Second, the Petition posits such an expansive view of the reserved powers doctrine that the result would not only eviscerate *U.S. Trust* and its progeny, but would confer upon Petitioner total and absolute legislative discretion to do what it pleases under the guise of its eminent domain and police powers. In advancing this unprecedented theory of legislative power, Petitioner essentially writes the constitutional Contract Clause and related judicial decisions out of existence. Moreover, Petitioner makes sweeping statements of its legislative prerogative that ring not

only without authority, but with positively (indeed, Orwellian) authoritarian overtones.[6]

These anti-constitutional pronouncements are clearly not the law. Testing the government's legislative purpose is *precisely* the Court's duty in adjudicating a constitutional challenge such as this – a duty that it is compelled to perform under the *U.S. Trust* line of cases. Taken on their face, Petitioner's blanket statements of legislative power would allow it to use its police and eminent domain powers to punish or otherwise discriminate against its political opponents or other minority – all without judicial scrutiny. That may or may not be what Petitioner intended here, but it underscores the fact that there are obvious constitutional limits on Petitioner's police and eminent domain powers, and the constraints of the Contract Clause, like those of the Due Process (or for that matter, the Equal Protection) Clause, cannot simply be brushed aside by blanket reliance on the common law "reserved powers" doctrine. That is all Petitioner offers in the Petition. Accordingly, the Petitioner should be denied.

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[6] Thus, Petitioner declares broadly that "[t]he courts must defer to the legislative branch when faced with issues of public purpose and eminent domain" and "[t]his Court must not question the City Council's finding of an absence of public purpose." Petition, at pp. 28, 30.

STATEMENT OF THE CASE

Chapter 38 was a response to Hawaii's long history of feudal land ownership, which survived well after American acquisition. *See Richardson*, 124 F.3d at 1153. At the time of Chapter 38's enactment, a small handful of landowners owned the vast majority of land in the State. Despite the efforts of Hawaii's leaders to divide these large Hawaiian land estates, the system persisted, driving the price of land in Hawaii to exorbitant heights. Hawaiian landowners rarely sold their estates. Instead, they frequently leased their land for long terms, often to developers who would construct condominiums on the property and then sell the units subject to the ground lease. *Id.* at 1153-54.

To break up this pattern and to increase the opportunity for landownership, Petitioner enacted Chapter 38. *See* Ordinance 91-95, § 1, set forth in Petitioner's App., at pp. 53a-58a. Chapter 38 provided that when a sufficient number of condominium unit owners within a condominium complex applied, Petitioner would take steps to acquire the property on which their condominium complex was built from the landowner by power of eminent domain. Petitioner would then convey each condominium unit and the appurtenant land to the lessee-applicants in fee simple. *See* Chapter 38, set forth in Pet. App., at pp. 95a, 104a-111a,124a-128a.

Specifically, Chapter 38 required an application from a minimum of either 25 condominium owners within a development of the owners of at least 50% of the condominium units within the development to trigger its condemnation mechanism. Revised Ordinances of Honolulu ("R.O.H.") § 38-2.2(a)(1), set forth in Pet. App., at p. 105a. Upon such application, Petitioner's Department of Community Services, fka Department of Housing and Community Development (the "Department"), would hold a duly-noticed public hearing to determine whether the acquisition of the leased interests through eminent domain would "effectuate public purposes" as defined in Chapter 38. R.O.H. § 38-2.2(a)(2), set forth in Pet. App., at pp. 105a-106a. If the Department issued a finding answering that question in the affirmative, the Department would designate the leased interests for acquisition through the power of eminent domain. Pet. App., at pp. 105a-106a. The Department's designation entitled applicants to a resolution adopted by the Honolulu City Council (the "Council") authorizing Petitioner's attorneys to initiate an eminent domain proceeding on the applicants' behalf. R.O.H. § 38-5.2, set forth in Pet. App., at p. 125a. *See also* Rules of Residential Condominium, Cooperative and Planned Development Leasehold Conversion (2000) (the "Rules"), § 2-12 set forth in Respondents' Appendix ("Resp. App.") 1, at p. App. 3.[7]

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[7] Petitioner mischaracterizes the nature, import and effect of the resolution intended by Rules § 2-12. Petitioner concludes

(Continued on following page)

Respondents hold leasehold interests in condominium units at the Discovery Bay condominium

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without any support that "[t]he adoption of a condemnation resolution for leasehold conversion by the City Council would establish that the condemnation of the leased fee interest of the subject property by [Petitioner's] exercise of its power of eminent domain was necessary for the public purpose and use as declared in Ordinance 91-95 and the purpose stated in Chapter 38." Petition, at 7. Petitioner is mistaken. Pursuant to Chapter 38's express language, the Department – not the Council – had the authority to: (1) determine whether the proposed condemnation would effectuate the public purpose of Chapter 38; and (2) designate the applicable property for acquisition by Petitioner through the exercise of its eminent domain power. R.O.H. § 38-2.2, set forth in Pet. App., at pp. 105a-106a. By the time the resolution required by Rules § 2-12 would be presented to the Council, the Department had already determined that the applicants had complied with all of Chapter 38's requirements and it had designated the applicable property for acquisition. R.O.H. §§ 38-2.2, 38-5.2, set forth in Pet. App., at pp. 105a-106a, 125a; Rules § 2-12, set forth in Resp. App. 1, at p. App. 3. Contrary to Petitioner's suggestion, the resolution requirement is simply intended to comply with other statutes and ordinances setting forth the procedure for Petitioner's exercise of its eminent domain powers. *See* Hawaii Revised Statutes §§ 101-13, 101-14 (1993), set forth in Resp. App. 2, at pp. App. 6-App. 7; R.O.H. § 2-3.2, set forth in Resp. App. 3, at p. App. 8. Indeed, Chapter 38 did not confer any authority on the Council with respect to the Chapter 38 process. *See* Chapter 38, set forth in Pet. App., at pp. 94a-129a. Accordingly, the Council's adoption of the resolution required by Rules § 2-12 was an administrative, ministerial act rather than a legislative one. *See Kaahumanu et al. v. County of Maui et al.*, 315 F.3d 1215, 1221-24 (9th Cir. 2003). It did not require the formulation of policy nor did it create a binding rule of conduct. Rather, in adopting such resolutions, the Council simply carried out, and did not change, the policies embodied in Chapter 38. *Id.*

complex in Honolulu, Hawaii. Pet. App., at pp. 5a, 25a, 36a. Respondents applied to Petitioner under Chapter 38 to convert their leasehold interests into fee simple interests in their units and the appurtenant land. *Id.* at pp. 5a-6a, 25a-26a, 36a-37a. Upon receipt of Respondents' applications, Petitioner entered into individual written contracts with each Respondent in which the Respondent promised to pay Petitioner $1000 in exchange for Petitioner's promise that, upon its successful acquisition of the leasehold interests at Discovery Bay, Petitioner would convey a fee interest to each Respondent in his or her unit and the appurtenant land. *Id.* Each contract was expressly conditioned on Petitioner's successful acquisition of the property pursuant to Chapter 38, and each party agreed to use its best efforts to effectuate the acquisition. *Id.* at p. 6a.

On August 3, 2004, after a duly-noticed public hearing, the Department announced its finding that condemnation of leased fee interests at Discovery Bay would effectuate the public purpose required by Chapter 38. *Id.* at pp. 6a, 26a, 37a.[8] A few months later, Respondents received written notice of their final approval to proceed with Chapter 38's leasehold conversion procedure. *Id.* at p. 6a. On November 4, 2004, the Department designated Respondents' leasehold interests in the real property and other

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[8] The Ninth Circuit's Opinion mistakenly states that the Department announced its finding of public purpose of July 3, 2004, instead of August 3, 2004.

common elements at Discovery Bay for acquisition through Petitioner's exercise of eminent domain, finding that Respondents had satisfied Chapter 38's numerosity requirement, that the condemnation would effectuate Chapter 38's public purpose, and that no agreement for a voluntary sale by the landowner had been made. *Id.* at pp. 6a, 26a, 37a.[9] On November 10, 2004, a Council member introduced a resolution to the Council, which sought the Council's approval to initiate an eminent domain proceeding on Respondents' behalf. *Id.* at pp. 7a, 30a, 41a.

However, as Respondents' applications were progressing, the Council began considering Bill 53, which would repeal Chapter 38. *Id.* at pp. 6a-7a, 26a-29a, 37a-40a. Thus, even though Respondents had met all the requirements of Chapter 38, the Council deferred consideration of the resolution pending the possible repeal of Chapter 38. *Id.* at pp. 7a, 30a, 41a.

On January 26, 2005, the Council enacted Ordinance 05-001, repealing Chapter 38. *Id.* at p. 7a. Ordinance 05-001 permitted any condemnation proceeding approved by Council resolution before the effective date of the repeal to continue, but because the Council never took such a step to approve the condemnation of the property at Discovery Bay,

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[9] The Ninth Circuit's Opinion and the District Court's orders mistakenly state that the Department designated Respondents' leasehold interests in Discovery Bay for acquisition through Petitioner's exercise of eminent domain on November 24, 2004, instead of November 4, 2004.

Respondents' efforts failed. *Id.* at pp. 7a, 30a, 41a-42a.

Respondents filed suit against Petitioner in the District Court, arguing that Ordinance 05-001 violated the Contract Clause, the Fourteenth Amendment's Due Process Clause, and 42 U.S.C. § 1983. *Id.* at pp. 7a, 31a, 42a. Shortly thereafter, Respondents moved for a preliminary injunction to enjoin the implementation of Ordinance 05-001, which the District Court denied. *Id.* Respondents then filed a motion for summary judgment, which the district court denied as well, granting summary judgment in favor of Petitioner instead. *Id.* at pp. 7a-8a, 31a-32a, 42a-43a. The District Court concluded that Respondents could not challenge Ordinance 05-001 under the Contract Clause because Respondents' Contracts with Petitioner were unenforceable. *Id.* at pp. 8a, 32a-34a, 45a-52a. It reasoned that the "reserved powers" doctrine precluded Petitioner from entering to the Contracts because they purported to limit Petitioner's power, a power which has been labeled as an "essential attribute of sovereignty." *Id.*

The Ninth Circuit disagreed with the District Court, held that *U.S. Trust's* heightened scrutiny test provides the mandatory analysis for Respondents' Contract Clause claims, vacated the District Court's grant of summary judgment in Petitioner's favor and remanded the case to allow the district court to consider Respondents' Contract Clause claims under the framework set forth in *U.S. Trust*. *Id.* at pp. 13a-14a, 16a, 19a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's Opinion is correct. It does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried its burden of demonstrating that any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Ninth Circuit's Holding That *U.S. Trust* Provides the Appropriate Standard of Review Is Consistent With This Court's Decisions on the Contract Clause

The Ninth Circuit correctly held that "*U.S. Trust's* heightened scrutiny test provides the mandatory analysis" for Respondents' Contract Clause claims. Ninth Circuit's Opinion, set forth in Pet. App., at 14a. In *U.S. Trust*, the Court recognized that the Contract Clause imposes important limits on the power of the state to modify its own contracts, as well as to regulate those between private parties, even in the exercise of the police power. *U.S. Trust*, 431 U.S. at 17, 22, 26. *See Allied Structural Steel Co.*, 438 U.S. at 242. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *U.S. Trust*, 431 U.S. at 22. Analyzing the modification of a contract to which the State itself was a party, the Court

held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither *reasonable* nor *necessary* to serve an important public purpose. *Id.* at 29-31. In applying this standard to a public contract, the Court made clear that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26. Simply because its view of the public interest might change, the State could not renege on its statutory promise not to reduce reserves pledged as security for Port Authority bonds. *Id.*

In the three decades since *U.S. Trust* was decided, the heightened scrutiny test has been repeatedly applied to Contract Clause claims involving public contracts. *See, e.g., Energy Reserves Group, Inc. v. The Kansas Power and Light Co.*, 459 U.S. 400 (1983); *So. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003); *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999). The test is a three-part inquiry that considers whether: (1) state law has, in fact, operated as a substantial impairment of a contractual relationship; (2) a significant and legitimate public purpose is served by the law; and (3) the impairment caused by the law is both reasonable and necessary to support an important public purpose.[10] *U.S. Trust*, 431 U.S. at

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[10] This test is contrasted with the low-level scrutiny test applicable to private contracts set forth in *Energy Reserves*, 459

(Continued on following page)

17, 22-23, 25-26, 29. *Accord Energy Reserves*, 459 U.S. at 411-12; *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004); *So. California Gas*, 336 F.3d at 889-890, 894; *Cayetano*, 183 F.3d at 1101-02, 1106.

Thus, when Petitioner impairs its own contracts, it must meet a high burden of justification. At the very least, it must show the "necessity" of the impairment. *U.S. Trust*, 431 U.S. at 29. Petitioner's self-serving or even utilitarian calculation of public benefit versus individual loss will not suffice: "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *U.S. Trust*, 431 U.S. at 29.

Here, Petitioner completely ignores *U.S. Trust's* heightened scrutiny public contract test and simply asserts, without authority, that Petitioner's regulatory and eminent domain powers cannot be limited by contract. Petition, at pp. 20-33. Indeed, it fails to impose any burden of justification on itself, much

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U.S. at 411-12. The low-level scrutiny test considers whether: (1) the state law has, in fact, operated as a substantial impairment of a contractual relationship; (2) a significant and legitimate public purpose is served by the regulation; and (3) the impairment caused by the law is based on reasonable conditions and is of a character appropriate to the public purpose i.e., whether the law is a reasonable and *appropriate* means to the ends. *Energy Reserves*, 459 U.S. at 411-12 (internal quotation marks, brackets and citation omitted).

less the burden of necessity. Despite this Court's admonition that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where the government's self-interest is at stake, 431 U.S. at 26, Petitioner asks the Court to do exactly that. Petition, at pp. 28-30.

Petitioner's dismissal of the *U.S. Trust* test directly conflicts with the appropriate Court precedent. The result is to render the Contract Clause meaningless and grant Petitioner absolute legislative discretion to do what it pleases under the guise of its eminent domain and police powers. This is exactly what the Court has warned against:

> [T]he Contract Clause remains part of the Constitution. It is not a dead letter. . . . If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of the State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police powers.

Allied Steel, 438 U.S. at 241-42 (emphasis in original).

Indeed, the District Court's refusal to apply the heightened scrutiny public contract test set forth in *U.S. Trust*, 431 U.S. at 17, 22-23, 25-26, 29 constituted reversible error, and the Ninth Circuit correctly vacated the District Court's grant of summary judgment in Petitioner's favor. *See United States v. Virginia et al.*, 518 U.S. 515, 555 (1996) (appellate court

committed plain and reversible error when it refused to apply heightened standard of review established by Court precedent, and instead devised another test using a lower standard of review and proceeded to find the new test satisfied).

II. The Ninth Circuit's Refusal to Apply the Reserved Powers Doctrine Does Not Conflict With This Courts' Decisions

The Ninth Circuit's refusal to apply the reserved powers doctrine to preclude Respondents' Contract Clause claims was correct. Ninth Circuit's Opinion, set forth in Pet. App., at pp. 9a-14a. The reserved powers doctrine prevents a sovereign from contracting away or surrendering only a narrow category of substantive governmental powers that are essential attributes of sovereignty. *See United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996); *U.S. Trust*, 431 U.S. at 23-25. The doctrine – a common law creation – is *not* an exception to, or substitution for, Contract Clause analysis under *U.S. Trust* and its progeny. *See Rui One*, 371 F.3d at 1147, 1150 (applying three-step inquiry to municipal ordinance enacted under broad police power to regulate wages and employment conditions); *So. California Gas*, 336 F.3d at 893 ("Santa Ana cannot avoid Contract Clause analysis merely by establishing that the trench cut ordinance is an otherwise legitimate exercise of police power"); *Cayetano*, 183 F.3d at 1107 (reviewing pay-lag statute, "we balance 'the contractual rights of the individual against the essential attributes of sovereign

power necessarily reserved by the States to safeguard the welfare of their citizens' ") (quoting *Ass'n of Surrogates & Supreme Court Reporters v. State*, 940 F.2d 766 (2d Cir. 1991)); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1005 (4th Cir. 1980) (*U.S. Trust* and *Allied Steel* "simply refine and update the traditional balancing test between reserved state police power and private contractual obligations that has always been required in Contract Clause analysis"). The doctrine does not remove the government's exercise of the police or eminent domain powers from judicial scrutiny. Thus, in a public contract case, even when the exercise of the police or eminent domain powers are at issue, the heightened scrutiny test must still be applied. *See, e.g., Rui One*, 371 F.3d at 1147; *So. California Gas*, 336 F.3d at 893; *Cayetano*, 183 F.3d at 1107. Indeed, the second part of the *U.S. Trust* analysis tests the legitimacy and significance of the asserted public purpose. *See Energy Reserves*, 459 U.S. at 12 ("[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests"); *Rui One*, 371 F.3d at 1147.

Moreover, while the Contract Clause does not require a state to adhere to a contract "that surrenders an essential attribute of its sovereignty," the reserved powers doctrine does not permit Petitioner to retrospectively revoke vested contractual rights – such as those held by Respondents under the Contracts – in violation of the Contract Clause. *U.S. Trust*, 431 U.S. at 23-25; *Coombes v. Getz*, 285 U.S.

434 (1931) (obligations of contract may not be impaired by the state in exercise of authority under reserved powers).[11] *See Energy Reserves*, 459 U.S. at 412, n.14 ("[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations"); *So. California Gas*, 336 F.3d at 893 ("[w]e cannot read the [public contract] in a way that reserves to Santa Ana the power to unilaterally alter the terms of the agreement"). A reserved powers doctrine that purports to give a State the power "'to deny or change the effect of [a] promise, is an absurdity.'" *U.S. Trust*, 431 U.S. at 25, n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)). *See also Cont'l Illinois Nat'l Bank v. Washington*, 696 F.2d 692, 698

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[11] In *Coombes*, the petitioner brought suit against a corporate director to recover the debt owed for goods sold to the corporation. A state constitutional provision that provided the basis for the director's contractual liability was repealed while petitioner's suit was on appeal. The respondent argued that the petitioner's right to enforce the liability provision fell with the repeal since it was dependent on the repealed provision and had not been perfected by final judgment.

The Court rejected the respondent's argument, holding that: (1) the right to enforce the liability provision was part of the petitioner's contract which fully vested before the repeal and was therefore protected by both the Contract Clause and due process; and (2) the reserved power of a state over corporations and their shareholders cannot be used to destroy the vested rights of third persons or to impair the obligations of their contracts. *Coombes*, 285 U.S. at 441-42. The Court explained that when a right arises upon contract and is so far perfected that nothing remains to be done by the party asserting it, the contractual right is vested and cannot be defeated by subsequent legislation under the Contract Clause. *Id.* at 443-45.

(9th Cir. 1983) ("A promise in a contract that gives one party the power to deny or change the effect of the promise, is an absurdity.") (internal quotation marks and citations omitted).

Here, Petitioner continues to ignore these binding precedents and to advocate for such an "absurdity." Rather than face its heightened burden of justification for enacting Ordinance 05-001 and impairing Respondents' Contracts, Petitioner simply repeats the mantra that its power of eminent domain is absolutely protected from judicial review by the reserved powers doctrine. In raising this anti-judicial shield, Petitioner misconstrues the reserved powers doctrine and fails to explain how it excuses Petitioner's impairment of the Contracts. Furthermore, Petitioner request that the Court use an anomalous and unprecedented application of the reserved powers doctrine – a common law creation – to nullify a constitutional provision. Such an unprecedented dismantling of "the Supreme Law of the Land", U.S. CONST., art. VI, cl. 2, is untenable. *See Philadelphia Newspapers, Inc. et al. v. Hepps et al.*, 475 U.S. 767, 775 (1986) (holding that the United States "Constitution . . . supplants the standards of the common law"); *Int'l Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1260 (11th Cir. 2000) (rejecting the argument that the common law of admiralty superseded the Property Clause of the United States Constitution).

None of Petitioner's cited cases support its claim that the reserved powers doctrine operates to permit

it to avoid its contractual obligations. Indeed, *U.S. Trust* and *Winstar* undermine it. In *U.S. Trust*, the Court traces the history of the reserved powers doctrine and in that context cites a number of 19th and early 20th Century cases holding that the state cannot contract away its police power and its power of eminent domain. *See U.S. Trust*, 431 U.S. at 23-24 (citing *West River Bridge v. Dix*, 47 U.S. 507 (1848), *Contributors to Pennsylvania Hosp. v. City of Philadelphia*, 245 U.S. 20 (1917) and others); *accord Winstar*, 116 S. Ct. 2432 at 874 (citing *West River Bridge* and others). But the Court goes on to state that "such formalistic distinctions perhaps cannot be dispositive" and proceeds to set out a heightened scrutiny test for evaluating state legislation that impairs contractual relations, *even where the state purports to exercise its police powers*. *See U.S. Trust*, 431 U.S. at 22 (contracts "are not subject to unlimited modification under the police power"); *Allied Steel*, 438 U.S. at 235 (the Contract Clause limits the state's power to impair contracts, "even in the exercise of its otherwise legitimate police power").

Thus, in the wake of *U.S. Trust*, categorical distinctions that except the traditional reserved powers (of police and eminent domain) from Contract Clause scrutiny are plainly improper as a matter of law. That is the fundamental flaw in Petitioner's analysis here; Petitioner does nothing more than categorize the enactment of Ordinance 05-001 as a legitimate exercise of the power of eminent domain and discredits any further inquiry. At a minimum,

Petitioner's highly deferential analysis conflicts with the scrutinizing analysis required in *U.S. Trust* and its progeny.

To the extent that *U.S. Trust* leaves room for a narrow category of reserved powers that the state cannot surrender, Petitioner's purported power to repeal Chapter 38 to repudiate the Contracts does not fall within that category. As a threshold matter, it is doubtful that the repeal of Chapter 38 and the destruction of Respondents' contract rights even constitute an exercise of Petitioner's eminent domain power. Respondents have vested contract rights.[12] *See Coombes*, 285 U.S. at 434, and *supra*, note 11. Petitioner's exercise of its eminent domain power in this context would have required that Respondents be paid just compensation. *See U.S. Trust*, 431 U.S. at 19, n.16 ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided

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[12] Vested contract claims rise to the level of a constitutionally protected property interest. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882) ("[A] vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."). A claim based on a contract vests at the time of a breach. *Gibbes*, 290 U.S. at 332; *Pritchard*, 106 at 132-33. Here, Respondents have vested contract claims that constitute property protected by the United States Constitution.

that just compensation is paid"). But Respondents received nothing from Petitioner except frustrating delay and broken promises.

III. The Ninth Circuit's Distinction Between Contracts Requiring a Government's Exercise of Eminent Domain and Those Restricting It Is Not Illusory

The reserved powers doctrine cannot apply because the legislative act at issue – the repeal of Chapter 38 – in no way limits, much less surrenders or "contracts away," Petitioner's power of eminent domain. Similarly, the Contracts themselves do not surrender this power. In this respect and contrary to Petitioner's suggestion, the Contracts bear absolutely no resemblance to the contract in *Contributors to Pennsylvania Hosp.*, which concerned a state law forbidding indefinitely the opening of any street through hospital grounds.[13] Rather, Respondents' Contracts simply require Petitioner to take certain discrete steps in the here and now to satisfy its specific promises to Respondents. If anything, it is Ordinance 05-001, not Lessees' Contracts, that limits

[13] The Ninth Circuit's Opinion correctly noted that there is no provision in the Contracts that purports to prevent Petitioner from conveying the property to Respondents and later taking the property for public use. Thus, the Contracts contain none of the same elements the Court found unenforceable in *Contributors to Pennsylvania Hosp.* *See* Pet. App., at p. 14a.

Petitioner's power of eminent domain by repealing its right to condemn leased fee interests.

And while it is true that Petitioner cannot agree to surrender its condemnation powers, the converse is not correct: there is nothing that forbids Petitioner from being held to a contract-based commitment to exercise this power. Thus, no authority supports Petitioner's blanket assertion that "[a] legislative body cannot be bound by an agreement to affirmatively use its eminent domain power." Petition, at 23. *See also* Petition, at 28. This conspicuous absence of authority is not surprising given the breathtaking implications of Petitioner's argument taken to the extreme, *i.e.*, that all of the Petitioner's Chapter 38 leasehold conversion contracts entered into since 1991 are null and void, and all resulting leasehold conversions were illegal. Of course, the Contracts do in effect prevent Petitioner from repealing Chapter 38 in such a way as to pull the rug out from under Respondents, but this is not the kind of future "limitation" on the power of eminent domain that any court has ever identified as a "reserved power." *See So. California Gas*, 336 F.3d at 893 (reservation of rights in public contract did not allow city to adopt ordinances to compromise its material terms); *Cont'l Illinois Nat'l Bank*, 696 F.2d at 698-99 (reading a statutory and purported reserved powers provision as applicable to prospective arrangements, but "not to modify pre-existing contracts"). *Cf. Winstar*, 116 S. Ct. at 881 (enforcement of government contracts with financial institutions permitting them to use special

accounting methods for their acquisitions of failing thrifts did not bind government's exercise of authority to modify banking regulation or other sovereign power).

Many of Petitioner's cited cases stand for the noncontroversial proposition that a government may not enter into a contract that surrenders its power of eminent domain.[14] These holdings are irrelevant to the issues presented in the Petition. Here, the legislative act in question – the repeal of Chapter 38 – in no way limits Petitioner's power of eminent domain. Nor do the Contracts themselves surrender or otherwise

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[14] *See* Petition, at pp. 22-24 (citing in the following order, *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1923) (holding that city's power to take land for street purposes is not impaired by the fact that State of Georgia owned land in Tennessee used for railroad purposes, and Georgia cannot claim sovereign immunity or privilege); *West River Bridge v. Dix*, 47 U.S. 507 (1948) (upholding court's order that toll bridge be taken for public use on payment of $4,000 even though State of Vermont awarded 100 year franchise to build and operate bridge some 48 years earlier); *City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 152 (Wis. 1952) (holding that city was not prevented from condemning and taking defendants' land for street purposes by reason of a provision in the city's grant of easement to defendants providing that city would not open a street through any of the property under grant without defendants' consent); *City of Corpus Christi v. Taylor*, 126 S.W.2d 712, 719 (Tex. Ct. App. 2004) (holding that covenant in deed, by and between city as grantor and defendants, that city "shall never file or prosecute any suit to condemn" property was unenforceable because city could not enter into a contractual provision which limits its free exercise of governmental and police powers).

limit that power.[15] Rather the Contracts merely require Petitioner to take certain discrete and immediate steps to satisfy its contractual obligations to Respondents.

Many of the reserved powers doctrine cases cited by Petitioner do not address the Contracts Clause or a government's legislative act as an impairment of contract at all.[16] For this reason, Petitioner's reliance on *Western Union Tel. Co. v. Louisville & N.R. Co.*, 258 U.S. 13 (1922), is misplaced. *See* Petition, at 24. Petitioner fails to mention that *Western Union* did not involve the Contract Clause or constitutional claims of impairment of contract. Rather, *Western Union*

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[15] It is noteworthy that all of Petitioner's cited cases that actually concern contracts address contracts that effectively forbade the government from using its power of eminent domain. *See* Petition, at pp. 22-23, 30-31 (citing *Schomberg*, 52 N.W. 2d at 152 (addressing provision in grant of easement that forbade city from condemning property under grant for street purposes); *Taylor*, 126 S.W.2d at 719 (addressing covenant in deed that city "shall never file or prosecute any suit to condemn" property under deed); *Contributors to Pennsylvania Hosp.*, 245 U.S. at 23 (addressing statutory contract between city and hospital that forbade the city from opening of any streets or alleys through the subject property)).

[16] *See* Petition's reference, at pp. 22-23, to *City of Chattanooga*, 264 U.S. at 480 (case does not concern legislative act that allegedly constitutes an unconstitutional impairment of contract; rather case addresses a city's commencement of judicial proceeding to condemn property), *Taylor*, 126 S.W.2d at 719 (case does not present constitutional issue of impairment), and *Schomberg*, 52 N.W.2d at 152 (case addressed a city's commencement of judicial proceeding to condemn property).

concerned a telegraph company's claims of vested rights and interference with judicial proceedings. Furthermore, the Court's *Western Union* opinion was issued in 1922, more than fifty years before the Court's adoption of the heightened scrutiny public contract test in *U.S. Trust*. These factors render *Western Union* completely inapplicable to this case.

Petitioner cites to *U.S. Trust* to support its erroneous claim that the reserved powers doctrine excuses its impairment of the Contracts and supplants any judicial analysis under the heightened scrutiny public contract test. *See* Petition, at pp. 20-21, 31-32. Neither *U.S. Trust* nor any other case made such a finding. Rather, *U.S. Trust* and its progeny make clear that the reserved powers doctrine is not an exception to, or substitution for, Contract Clause analysis under *U.S. Trust*. In a public contract case, even when the exercise of the police or eminent domain powers are at issue, the heightened scrutiny test must still be applied. *See, e.g., Energy Reserves*, 459 U.S. at 412; *Rui One*, 371 F.3d at 1147; *So. California Gas*, 336 F.3d at 893; *Cayetano*, 183 F.3d at 1107.

IV. Petitioner's Claim That the Council's Legislative Discretion Is Absolute Conflicts With This Court's Decisions

Petitioner's repeated pronouncements that this Court must defer to the Council's determinations on issues of public purpose and eminent domain are

clearly not the law. *See* Petition, at pp. 28-30. Taken to their extreme, the Petitioner's sweeping statements of legislative power would allow it to use its police and eminent domain powers to punish or otherwise discriminate against its political opponents with impunity.

It is axiomatic that a legislature's acts are subject to judicial review for their constitutionality. *See Marbury v. Madison*, 5 U.S. 137 (1803). In this context, assessment of legislative purpose is hardly a forbidden role of the judiciary; indeed, it is a duty that the courts regularly perform in adjudicating a variety of constitutional claims. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138 (1986) (local law that discriminates against interstate commerce valid only if it serves a "legitimate local purpose" that could not be served by available alternatives); *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (regulation on commercial speech valid only if it "directly advances" a "substantial" government purpose and is narrowly tailored to serve that purpose); *Craig v. Boren*, 429 U.S. 190 (1976) (legislative classification based on gender invalid unless it is "substantially related" to an "important" government purpose). Legislative purpose is similarly subject to judicial scrutiny under the Contract Clause. *See U.S. Trust*, 431 U.S. at 23-25. *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) ("[T]he Contract Clause remains part of the Constitution. It is not a dead letter.").

These basic tenets of judicial review cannot be brushed aside by blanket reliance on the common law reserved powers doctrine. The enactment of Ordinance 05-001 is *precisely* the type of legislative impairment of contract that the Contract Clause was designed to prevent.[17] Under the *U.S. Trust* line of cases, assessing the legitimacy and necessity of Petitioner's purported purpose in enacting Ordinance 05-001 is precisely the Court's duty in adjudicating Respondents' constitutional claims. *See Energy Resources*, 459 U.S. at 412. The Court can no more ignore this duty under the Contract Clause than it can

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[17] The Contract Clause was created to guard against a vast "array of state legislative schemes" plaguing the early Republic, aimed at defeating contractual obligations. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

> 'The power of . . . interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.'

Blaisdell, 290 U.S. at 428 (quoting *Ogden v. Saunders*, 25 U.S. 213, 254-55 (1827) (Marshall, C.J.)).

under the Equal Protection or Due Process Clauses. Nor can Petitioner ignore the Contract Clause or any *other constitutional provision* simply because it views the provision – or accompanying judicial review – as a threat to its legislative discretion.

The governing case law makes clear that blind deference to the Council's purported purpose in enacting Ordinance 05-001 is wholly improper. As stated by Justice Blackmun, and contrary to Petitioner's argument:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. . . . If a State could reduce its . . . obligations whenever it wanted to . . . for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. . . . [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

U.S. Trust, 431 U.S. at 26, 30-31.

Similarly, the Ninth Circuit has recognized:

> A higher level of scrutiny is required to assess abrogations of government obligations than in the case of legislative interference with the contract of private parties. . . . Accordingly, [courts] are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its own contracts.

Cayetano, 183 F.3d at 1107 (holding State did not establish law was both necessary and reasonable) (internal quotation marks and citation omitted). That heightened level of scrutiny is necessary here, where Petitioner's enactment of Ordinance 05-001 impaired its obligations, and extinguished Respondents' rights, under the Contracts.

V. There Is No Reason for This Court to Consider Whether Petitioner Can Be Contractually Bound by the Contracts After Chapter 38's Repeal

"'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970)). Petitioner's second question for review – that it cannot be contractually bound by the Contracts after Chapter 38's repeal, *see* Petition, at p. i – was not raised by Petitioner before the Ninth Circuit or the District Court, nor considered or decided by those courts. *See* Pet. App., at pp. 1a-19a, 24a-52a.[18] The Petition contains no discussion or

[18] In fact, the only issued addressed by the Ninth Circuit was "whether the United States Constitution imposes any limit on the [Petitioner's] power to repudiate a contract to convey property to a private citizen in connection with its leasehold conversion program." Ninth Circuit's Opinion, set forth in Pet. App., at p. 3a.

argument on this issue. Further, this Court's opinion in *Coombes* answers Petitioner's second question in the negative. *See Coombes*, *supra*, note 11. Petitioner's disingenuous effort by its second "question" to persuade the Court that there are compelling reasons to grant the Petition is wholly unsupported, and should not be considered by this Court. *See Yeskey*, 524 U.S. at 212-13; *Adickes*, 398 U.S. at 147, n.2.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, for the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

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APPENDIX 1

CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

RULES FOR RESIDENTIAL CONDOMINIUM, COOPERATIVE AND PLANNED DEVELOPMENT LEASEHOLD CONVERSION

CHAPTER 1	RULES OF GENERAL APPLICATION
§1-1	Applicability
§1-2	Definitions
§1-3	Severability
§1-4	Authority of the department
§1-5	Investigations
§1-6	Collection of information
§1-7	Dissemination of information
§1-8	Contracts, documents, deeds
§1-9	Burden of proof; oaths, affidavits
§1-10	Revolving fund
CHAPTER 2	LEASEHOLD CONDOMINIUMS
SUBCHAPTER 1	PURPOSE; APPLICABILITY
§2-1	Purpose
§2-2	Applicability

SUBCHAPTER 2 APPLICATION; FINDING; NEGOTIATIONS

§2-3 Application by lessees

§2-4 Qualifications for purchase

§2-5 Review of applications; preliminary approval

§2-6 Public notice; public hearing

§2-7 Finding of Effectuation of public purpose

§2-8 Negotiation by fees owners and preliminarily approved applicants

§2-9 Estimated costs

§2-10 Initial deposit; final approval of applicants

SUBCHAPTER 3 DESIGNATION; CONDEMNATION; WITHDRAWAL; SUBSTITUTION

§2-11 Designation

§2-12 Condemnation

§2-13 Withdrawal

§2-14 Substitution

SUBCHAPTER 4 ADDITIONAL DEPOSITS; SUBSEQUENT APPLICANTS

§2-15 Additional deposits

§2-16 Subsequent applicants

* * *

§2-12 *Condemnation.* Following the designation by the director of the individual residential condominium interests, the director shall request the corporation counsel to prepare and present to the City Council a Resolution for the exercise of the power of eminent domain for the condemnation of the legal and equitable interests of the fee owner, lessor, or equitable owner of the leased fee interest, and may request the appropriation of the funds necessary to pay the compensation for the leased fee interest. He director shall also request the corporation counsel to file the necessary legal action no later than 12 months after the designation. If some of the applicants have reached an agreement with the fee owners, the Resolution and condemnation action shall relate only to the remaining applicants who have not reached an agreement. [Eff 10/9/93; am and ren §2-12 DEC 22 2000] (Auth. ROH §38-1.8(a),(i)) (Imp: ROH §38-5.2; RCH §§3-110; 3-202)

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APPENDIX 2

HAWAII REVISED STATUTES

TITLE 9. PUBLIC PROPERTY, PURCHASING AND CONTRACTING

CHAPTER	
101	EMINENT DOMAIN
102	CONCESSIONS ON PUBLIC PROPERTY
103	EXPENDITURE OF PUBLIC MONEY AND PUBLIC CONTRACTS
103D	HAWAII PUBLIC PROCUREMENT CODE
104	WAGES AND HOURS OF EMPLOYEES ON PUBLIC WORKS
105	GOVERNMENT MOTOR VEHICLES
106	INVENTORY, ACCOUNTING, AND DISPOSAL OF GOVERNMENT ASSETS
107	PUBLIC IMPROVEMENTS
109	STADIUMS
110	STATE-OWNED CEMETERIES
111	ASSISTANCE TO DISPLACED PERSONS
113	LAND ACQUISITION POLICIES FOR FEDERALLY ASSISTED PROGRAMS
115	PUBLIC ACCESS TO COASTAL AND INLAND RECREATIONAL AREAS

CHAPTER 101 EMINENT DOMAIN

PART I. CONDEMNATION OF PRIVATE PROPERTY

SECTION

101-1	DEFINITIONS
101-2	TAKING PRIVATE PROPERTY FOR PUBLIC USE; DISPOSAL OF EXCESS PROPERTY
101-3	ENTRY UPON PRIVATE PROPERTY BY AGREEMENT
101-3.5	PRIORITY FOR LESSEES DISLOCATED BY CONDEMNATION PROCEEDINGS
101-4	RIGHT OF EMINENT DOMAIN GRANTED TO PUBLIC UTILITIES AND OTHERS
101-5	FEE SIMPLE OR LESSER ESTATE MAY BE ACQUIRED
101-6	WHAT PROPERTY MAY BE TAKEN
101-7	SUPERIOR PUBLIC USE
101-8	ENTERING AND SURVEYING LAND
101-9	ACTIONS; PRIORITY
101-10	CIRCUIT COURTS HAVE JURISDICTION
101-11	PROCEDURE AS IN CIVIL ACTIONS
101-12	EVIDENCE
101-13	EXERCISE OF POWER BY COUNTY
101-14	PLAINTIFF
101-15	COMPLAINT;DEFENDANTS
101-16	COMPLAINT; ADDITIONAL CONTENTS; MAP
101-17	DIFFERENT PROPERTIES IN ONE ACTION
101-18	JOINT OR CONSOLIDATED ACTIONS BY GOVERNMENTAL AGENCIES
101-19	AMENDMENTS OF COMPLAINTS, CITATIONS
101-20	NOTICE

101-21	INTERVENORS
101-22	DECISION
101-23	DAMAGES ASSESSED, HOW
101-24	ASSESSED AS OF DAY OF SUMMONS
101-25	PAYMENT OF JUDGMENT, PENALTIES
101-26	FINAL ORDER OF CONDEMNATION
101-27	DEFENDANT ALLOWED DAMAGES UPON ABANDONMENT OR DISMISSAL OF PROCEEDINGS
101-28	POSSESSION PENDING ACTION; IMMEDIATE OCCUPATION BY PLAINTIFF
101-29	POSSESSION PENDING ACTION; ALTERNATIVE PROCEDURE
101-30	ORDER OF POSSESSION
101-31	PAYMENT OF ESTIMATED COMPENSATION; EFFECT THEREOF

* * *

§101-13 Exercise of power by county. Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted as provided in section 101-14 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. The resolution, in the case of the city and county of Honolulu or an independent board thereof, shall, after its introduction, be published in a daily newspaper with the ayes and noes, once (Sundays and legal holidays excepted) at

least three days before final action upon it, and in the case of any other county or an independent board thereof, be published in a newspaper with the ayes and noes, at least one day (Sundays and legal holidays excepted), before final action upon it. [L 1919, c 63, §1; am L 1923, c 48, §1; RL 1925, §815; am imp L 1933, c 98, §2; RL 1935, §57; RL 1945, §308; am L 1951, c 12, §1(h); RL 1955, §8-11; HRS §101-13]

§101-14 Plaintiff. The attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part. Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county for any of the purposes provided in this part which are within the powers granted to the county. [L 1896. c 45, §4; am L 1917, c 108, §2; RL 1925, §816; RL 1935, §58; RL 1945, §309; am L 1947, c 200, §1(b); am L 1951, c 12, §1(i); RL 1955, §8-12; HRS §101-14]

* * *

APPENDIX 3

REVISED ORDINANCES OF HONOLULU

* * *

Sec. 2-3.2 Prohibited acts.

The corporation counsel shall not:

(a) Initiate, engage or participate in any legal action or proceedings in which the city, its officials and/or employees are not directly involved in or named as a party to a contemplated or ongoing legal proceeding.

(b) Other than situations where corporation counsel is expressly authorized by federal or state statutes or city laws, bring action against a private person as defined in Section 1-4.1 without first obtaining the consent and approval of the city council which shall be manifested by an adopted council resolution.

(Sec. 2-3.2, R.O. 1978 (1983 Ed.); Am. Ord. 96-58)

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